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Supreme Court, U.S.
FILED
DEC 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-263

IN THE

Supreme Court of the United States

October Term, 1980

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, and ITHACA COLLEGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

BERNARD F. ASHE
Attorney for Petitioner
80 Wolf Road
Albany, N. Y. 12205
(518) 459-5400

ROCCO A. SOLIMANDO
Of Counsel

KEVIN H. HARREN
Of Counsel

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Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Ithaca College Faculty Association, NYSUT-AFT, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Questions Presented for Review.

1. Whether the order of the National Labor Relations Board, which directs that respondent Ithaca College rec-

ognize and bargain in good faith with the Ithaca College Faculty Association, NYSUT-AFT, as the exclusive collective bargaining representative of the faculty of Ithaca College, should be enforced when there is a claim, not raised in a timely manner under the rules of the National Labor Relations Board, that the individuals in the bargaining unit are not employees within the meaning of the National Labor Relations Act.

2. Whether the National Labor Relations Board erred in determining that certain procedural tactics utilized by respondent Ithaca College during the representation proceeding before the National Labor Relations Board were not frivolous, and that the petitioner Ithaca College Faculty Association, NYSUT-AFT, was not thereby entitled to be reimbursed for attorneys' fees.

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Opinions Below.

The opinion of the Court of Appeals is not yet officially reported (the opinion of the Court of Appeals is appended to this petition as Appendix "A," pp. A-1 through A-12).

The decision and order of the National Labor Relations Board in this case (Appendix "B," pp. B-1 through B-14) is officially reported at 244 N.L.R.B. No. 54.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

The relevant portions of the National Labor Relations Act, as amended (29 U.S.C. §151 *et seq.*), are as follows:

> SEC. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * *
>
> SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

SEC. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment—

* * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * *

* * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * *

SEC. 10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * *

* * *

(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate termporary relief or restraining order, and shall file

in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * *

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District of

Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Statement of the Case.

In December, 1977, a labor organization known as the AAUP Chapter, Ithaca College, filed a petition pursuant to Section 9 of the National Labor Relations Act, as amended (29 U.S.C. §150 *et seq.*), and the Rules and Regulations of the National Labor Relations Board (29 CFR §101.17 ff) seeking to have itself certified as the exclusive collective bargaining representative of the full-time faculty employed by respondent Ithaca College (herein referred to as the "Employer" or the "College").

In January, 1978, a hearing was held upon the petition pursuant to the Rules of the NLRB (29 CFR §102.60 *et seq.*). At that hearing, petitioner Ithaca College Faculty Association, NYSUT-AFT (hereinafter referred to as the

ICFA), intervened and thereby became a party in the representation proceeding. At that hearing, each of the parties was given full opportunity to present any and all issues with respect to the existence of a question concerning representation, and the question as to whether the faculty at the College constituted an appropriate unit for bargaining within the meaning of §9(b) of the National Labor Relations Act.

On February 3, 1978, the Regional Director for the Third Region of the NLRB issued a decision and direction of election based upon the record adduced at the representation hearing (a copy of the Decision and Direction of Election is appended as Appendix "C," pp. C-1 through C-7). In that decision, the Regional Director determined that the following constitutes a unit appropriate for bargaining:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

Thereafter, the parties agreed by stipulation to amend the unit description to read as follows:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location, and at the Albert Einstein Medical Center in New York City, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

As a part of that stipulation (Appendix "D," p. D-1), the parties agreed as follows:

> The undersigned parties do hereby also agree and stipulate that the inclusion in the unit of the seven employees at Ithaca College who are employed at the Albert Einstein Medical Center shall not, in part or in whole, be grounds for objections to conduct affecting the results of the election, and we hereby agree and stipulate that the eligibility issues resolved herein are final and binding upon the parties.

On March 3, 1978, an election was held in the unit found appropriate for purposes of collective bargaining. The results of that election were inconclusive. The number of challenged ballots cast was sufficient to affect the results of the election, and, subsequent to the election, objections were filed to the conduct of that election.

On April 27, 1978, the Regional Director for the Third Region of the NLRB issued a report on challenged ballots and objections, and, on July 26, 1978, the NLRB issued an order adopting the Regional Director's report and ordered that certain ballots be opened (Appendix "E," pp. E-1 through E-3).

The revised tally of ballots which issued as a result of the opening of the challenged ballots necessitated, pursuant to the Regulations of the NLRB (29 CFR §102.70), a run-off election between the "ICFA" and the "No Union" choice. The run-off election was then scheduled to be held on September 29, 1978.

Prior to the holding of the run-off election, however, the College engaged in several procedural maneuvers involving not only the Board but also the Federal Courts, in an attempt to halt the holding of that election. It is this series of maneuvers which the ICFA now points to as evidence that the College was engaging in frivolous litigation in an attempt to thwart the expression of the employees' desires concerning whether they wish to be represented by the ICFA.

Each of the College's tactics was designed to enable it to relitigate the issue of the appropriateness of the unit in view of the then-recent decision of the U.S. Court of Appeals for the Second Circuit in *NLRB v. Yeshiva University*, 582 F. 2d 686 (2nd Cir., July 31, 1978), which was subsequently affirmed by this Court on February 20, 1980 (U. S. , 100 S. Ct. 856).

On August 22, 1978, the College filed a motion for rehearing before the Regional Director. In this motion, the College sought to relitigate the issue of the appropriateness of the unit. Specifically, the College sought a rehearing on the issue of the supervisory and/or managerial status of each of the faculty members included in the unit.

On August 25, 1978, the Regional Director denied the College's motion, and on August 30, 1978, the College requested that the Board review the Regional Director's decision.

While that request was pending before the Board, the College informed the Regional Director on September 15, 1978, that the College was withdrawing the voter eligibility (*Excelsior*) list which it had prepared for the upcoming run-off election.

The employer also moved, in the U. S. District Court for the Northern District of New York by order to show cause dated September 21, 1978, for an injunction against the Regional Director and the NLRB to preclude the holding of the election. At the hearing on the employer's application for the injunction, counsel for the ICFA successfully moved to intervene. On that day, the Judge rendered a bench decision which dismissed the complaint and denied the employer's request for an injunction.

The College immediately informed the Court that it intended to appeal the Judge's dismissal of the complaint, and requested that the District Court issue an injunction pending appeal. This request for injunction was similarly denied.

On September 26, 1978, the College appealed the decision of the District Court to the U. S. Court of Appeals for the Second Circuit and requested an injunction pending appeal. The College's request for an injunction pending appeal was in due course denied by the Second Circuit, and the appeal was subsequently withdrawn.

The Board had, in the meantime, denied the employer's request for review of the Regional Director's decision denying the College's motion for a rehearing on the appropriateness of the unit, and the election took place as scheduled on September 29, 1978. At the election, the College attempted to challenge the ballot of each and every voter. These proposed challenges were rejected by the Board Agent conducting the election.

The September 29 election resulted in challenged ballots sufficient in number to affect the outcome of the election, and, in addition, objections to the conduct of the election were filed by the College.

On November 8, 1978, the Regional Director for the Third Region issued a Report on Objections and Challenges which recommended to the Board that the ICFA be certified as the bargaining representative of the employees in the unit.

Thereafter, the College filed exceptions to this report on or about November 28, 1978.

On January 31, 1979, the Board issued a Decision and Certification of Representatives (Appendix "F," pp. F-1 through F-3), which finally determined that the ICFA was entitled to be the exclusive bargaining agent for the employees in the unit.

On or about February 12, 1979, the College filed a motion for reconsideration before the Board, and on or about February 22, 1979, the Board denied this motion for reconsideration.

On February 23, 1979, the ICFA filed the unfair labor practice charge with which this petition for review is concerned. This charge alleged that the College violated Sections 8(a)(1) and (5) of the National Labor Relations Act by refusing to meet and bargain with the ICFA despite the fact that the ICFA had been certified on January 31, 1979, as the exclusive bargaining agent for the employees in the unit.

On March 29, 1979, the Acting Regional Director for Region 3 issued a complaint and notice of hearing alleging that the College had violated Sections 8(a)(1) and (5) of the Act as had been charged in the unfair labor practice charge filed on February 23rd.

After the College filed its answer to the complaint the General Counsel of the NLRB moved the Board for summary judgment on the complaint, and on May 23, 1979, the Board transferred the unfair labor practice proceeding to itself.

Thereafter, counsel for the ICFA filed with the Board a "Motion in Support of General Counsel's Motion for Summary Judgment and Request for Specific Relief." It is in this document that the ICFA requested to be reimbursed for the attorneys' fees incurred by it during the processing of both the underlying representation case and the unfair labor practice case before the Board.

On August 22, 1979, the NLRB issued the decision and order which is the subject of this proceeding.

The NLRB concluded that the College had committed an unfair labor practice by its refusal to bargain with the ICFA.

The Board reasoned that:

> With the exception of its defense to the allegation that it has refused to supply the Association with certain requested information, all issues raised by respondent in this proceeding were or could have been litigated in the prior representation proceeding, and respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to re-examine the decision made in the representation proceeding.
>
> With respect to the request to supply information, respondent concedes that the Association has

> requested a list of all full-time faculty members currently being considered for promotion and/or tenure. As the collective bargaining representative for employees within the appropriate unit, the Association is entitled to information on the classification and seniority of each unit employee and to information concerning any changes in an employee's status. Consequently, we find that respondent's affirmative defense to the allegation of refusal to supply information is without merit.
>
> We therefore find that respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the motion for summary judgment (B-6).

In a footnote to this last quoted paragraph, the Board rejected the ICFA's request for attorney's fees:

> The Association's request for extraordinary remedies is denied since we do not believe that the defenses raised by the respondent in this proceeding are patently frivolous.

Both the College and the ICFA filed petitions for review with the U. S. Court of Appeals for the Second Circuit. The College sought a dismissal of the Board's unfair labor practice determination, and the ICFA sought a finding that the Board erred in ruling that the Employer's defenses were not "patently frivolous."

Each of these petitions was grounded upon the Court of Appeals' jurisdiction to review orders of the NLRB (29 USC §160[f]). In addition, the NLRB subsequently filed a petition for enforcement of its order pursuant to 29 USC §160(e). The three cases were consolidated for consideration by the Court.

The Second Circuit disposed of these three appeals in a decision issued on May 19, 1980, which resulted in the entry of the judgment for which certiorari is now sought in this Court.

The Second Circuit granted the College's petition for review and dismissed the NLRB's order directing the College to bargain with the ICFA. The Court also denied ICFA's petition for review and the NLRB's cross-petition for enforcement of its order.

The ICFA now seeks a writ of certiorari to have the Judgment of the Court of Appeals reviewed by the Court inasmuch as that decision by the Court of Appeals represents a dramatic departure from principles enunciated in applicable decisions of this Court.

Reasons for Granting the Petition.

The decision of the Second Circuit dismissing the NLRB's finding of an unfair labor practice against the College was clearly an effort by that Court's panel to express its dissatisfaction with the policy of the NLRB to refuse, in certain cases, to acquiesce in the decisions of a Circuit Court of Appeals until such time as the Supreme Court has finally decided a particular issue.

There was no need, however, for the Court to even reach that point of contention inasmuch as the NLRB order in dispute did not rely for its validity on the applicability of the criteria established by the Second Circuit in *Yeshiva*. Rather, the disputed NLRB order relied upon a well-established rule that issues involving representation matters must be raised in a timely manner, and that, if those issues are not so raised, they are forever waived and cannot be raised in the context of a subsequent unfair

labor practice proceeding. The Court of Appeals refused to recognize that fact, and by doing so decided the case in a manner in conflict with applicable decisions of this Court. It is for that reason that the ICFA now seeks review of the judgment of the Court of Appeals.

The ICFA's position that the NLRB's order is enforceable notwithstanding the decision in *Yeshiva* is grounded upon an analysis of the procedural posture of this particular case, the well-established statutory scheme governing the administration of the National Labor Relations Act, and the scope of judicial review of the NLRB's orders.

As a starting point for this analysis, the limited scope of the issues which should have been dealt with by the Court of Appeals should be discussed.

The appeal to the Second Circuit was founded on the authority of Section 10(f) of the National Labor Relations Act, as amended (29 USC §160[f]). The College initiated review, and the NLRB cross-moved, pursuant to Section 10(e) of the Act, for enforcement of its order. The ICFA intervened in the College's appeal, and, in addition, filed its own appeal of the NLRB's refusal to characterize certain defenses raised by the employer before the Board as "frivolous."

The scope of judicial review of orders of the NLRB in cases arising under these provisions of the NLRA is strictly limited. Section 10(e) of the Act provides that:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Similarly, Section 10(f) provides that:

> "* * * the findings of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The U. S. Supreme Court addressed the issue of the scope of judicial review of NLRB orders in *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951). In that decision, the Court stated:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The duty of the Court of Appeals was thus well defined; the Court was empowered to determine if the factual find-

ings underlying the determination that the College illegally refused to bargain with the ICFA were supported by substantial evidence contained in the record before the Court for review.

It is now submitted that, had the Second Circuit applied that test, it would have found that the record upon which the NLRB based its findings clearly supported those findings, and that those findings should have been conclusive upon the Court.

However, the Second Circuit went beyond the application of this test in rendering its decision. It is this act which constitutes the error the ICFA now seeks to have this Court correct. The question is one which should be decided by this Court in view of the far-reaching consequences that would result from allowing an overly-broad scope of judicial review to be interjected into the administration of the Nation's labor laws.

In the representation proceeding before the NLRB, a hearing was held at which the parties exercised their rights to present whatever evidence they desired with respect to the employee status of the faculty members of the College and also with respect to the issue of the appropriate unit to represent faculty members at the College. The record before the Second Circuit contained the transcript of this representation hearing, together with copies of the exhibits introduced at the hearing and the post-hearing briefs.

On February 3, 1978, the Regional Director for the Third Region of the NLRB issued his Decision and Direction of Election (Appendix "C"). In that decision, the Regional Director made a factual finding that the following constituted an appropriate unit for bargaining:

> "All full-time faculty members employed by Ithaca College at its Ithaca, New York location but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act."

Thereafter, the parties agreed that the appropriate unit would be amended in a minor respect, and expressly waived, by stipulation, any eligibility issues, stating:

> "* * * we hereby agree and stipulate that the eligibility issues resolved herein are final and binding upon the parties" (Appendix "D").

There were no exceptions taken to the Regional Director's findings of fact with respect to the Decision and Direction of Election, which included a finding that department chairmen would be allowed to vote since "the record does not reveal sufficient information upon which to base a conclusion" as to *their* supervisory status (C-5).

Upon the original election conducted among the employees in this unit, the NLRB reviewed the Regional Director's recommendations with respect to the determinative challenges and objections made to that election (Appendix "E"). In its order, dated July 26, 1978, the NLRB stated, *inter alia*, that:

> "* * * it is hereby directed that, as part of the investigation to ascertain a representative for the purposes of collective bargaining among certain employees of Ithaca College *in the unit heretofore found appropriate* * * * The Regional Director * * * shall * * * open and count those ballots to which challenges have been overruled * * *" (Emphasis added.)

It was not until after this Board order that the College first attempted to litigate the issue of the managerial status of the faculty members.

Thus, the instant case is, factually, very different from *Yeshiva*. In *Yeshiva*, the employer raised the managerial status of the faculty at the initial representation hearing. Accordingly, the NLRB and the Courts had in that case a proper record upon which to base their findings of fact.

In the case at bar, the record is totally devoid of any evidence that the College attempted to raise the issue of the managerial status of the faculty at any time prior to the NLRB finding, on July 26, 1978, that the faculty at the College did constitute a unit appropriate for bargaining. This is so despite the fact that the College was free to raise this issue at the initial representation hearing.

In its decision which was before the Second Circuit for review, the Board stated:

> "It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding" (B-5).

Thus, the Board said that the issue of the appropriateness of the unit had already been decided, and that the Employer may not relitigate that issue in the context of the unfair labor practice proceeding arising out of that representation case. The Board relied for its position in this respect on *Pittsburgh Plate Glass Co. v. NLRB*, 313

U. S. 146, 162 (1941), and the Rules and Regulations of the NLRB, §§102.67(f) and 102.69 (c); 29 CFR §102.67(f); 29 CFR §102.69(c).

In view of its determination that the College had waived its right to litigate the managerial status of the employees at issue, the Board made the following finding of fact, denominated as such, in reaching its order which was before the Second Circuit:

> "The following employees of [the College] constitute a unit appropriate for collective bargaining purposes within the meaning of §9(b) of the Act; all full-time faculty members employed by Ithaca College at its Ithaca, New York location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act" (B-8).

It is thus clear that the factual finding of the NLRB that the faculty at Ithaca College are employees within the meaning of the Act is supported by the substantial evidence on the record showing the facts of the waiver and that that finding of fact should have been conclusive on the issue when it was reviewed by the Second Circuit.

However, the Second Circuit did not feel bound by this factual finding on the issue of waiver, but does not explain why. The decision only scolds the NLRB with respect to its policy of non-acquiescence in certain decisions of Circuit Courts of Appeal.

The real issue in this case, the validity of the Board's factual findings, appears to have been overlooked in the Court's decision to chastise the NLRB for a policy which really has nothing to do with the instant case.

In fact, the Second Circuit specifically stated that

> "* * * Moreover, if there truly was a procedural hurdle that prevented [a hearing on the merits of the College's *Yeshiva* claim], the fact that the Supreme Court affirmed in *Yeshiva* should not have made any difference" (A-7).

The ICFA has consistently argued that the College waived its right to litigate the issue of the managerial status of its faculty. Further, the NLRB clearly stated that such a waiver had occurred.

Accordingly, it is submitted that the litigation in *Yeshiva* should not have any bearing on this case, for the right to present facts upon which the College could argue for the applicability of the *Yeshiva* criteria was lost. The Second Circuit erred in not limiting its inquiry to whether the NLRB's finding of a waiver was based upon substantial evidence.

If the Court had limited its inquiry to the scope allowed by the National Labor Relations Act, it would have discovered that there was evidence in the record to support the Board's finding that the College had waived its right to litigate the issue of the managerial status of the faculty.

The Court would have had to look no further than the Stipulation between the parties that stated that the faculty constituted an appropriate unit for bargaining and that

> "the eligibility issues resolved herein are final and binding upon the parties" (D-1).

Thus, the Second Circuit went beyond its legitimate authority in denying enforcement to the NLRB's order.

In this respect, it should be noted that the decisions of both the Second Circuit and the Supreme Court in *Yeshiva* were a result of nothing more than an application of a traditional "substantial evidence" test. Throughout their decisions, the Courts stressed that their decisions were limited to the facts presented on *the record presented in that case*. It is submitted that, in both *Yeshiva* decisions, the Courts were saying nothing more than that the NLRB's factual finding that the faculty at Yeshiva was an appropriate unit for bargaining was not supported by substantial evidence contained in the record.

In this case, the record does support a finding that the College waived its right to contest whether the faculty were in fact managerial employees, and the Second Circuit would have so found had it applied a proper test. This Court should correct that error in order to establish once again the limited scope of judicial review under the National Labor Relations Act. This Court has consistently voiced its approval of this well-established statutory scheme of the Federal labor law. That policy is that representation issues are litigated within the context of representation proceedings pursuant to Section 9 of the National Labor Relations Act, and that once a labor organization is certified pursuant to that section as the exclusive representative of an appropriate unit, the issue of the appropriateness of the unit is final. That issue may not then be relitigated beyond a review by a court of the record comprising the representation case. On that review, the court determination must be limited to deciding whether the determination of the NLRB was supported by substantial evidence. *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401 (1940); *Leedom v. Kyne*, 358 U. S. 184 (1958); *Universal Camera Corp. v. NLRB, supra.*

The fact that the Second Circuit departed so radically from this well-established principle warrants the granting of a writ of certiorari by this Court.

In addition to applying an overly-broad test of judicial review, the Second Circuit erred, the ICFA submits, by upholding the NLRB's determination that the issues raised by the College before the Board, in both the representation proceeding and the unfair labor practice proceeding, and before the Federal Courts in its unsuccessful attempt to enjoin the holding of the second election were not patently frivolous.

It is well-settled law that, when an employer resists unionization of its employees by engaging in frivolous litigation designed only to delay the employer's performance of a statutory obligation, the employer may be required to pay the legal expenses of the union incurred during the representation proceeding and subsequent unfair labor practice proceeding. *NLRB v. Food Store Employees Union Local 3487 (Heck's Inc.)*, 417 U. S. 1 (1974); *International Union of Electrical Workers v. NLRB (Tiidee Products, Inc.)*, 502 F. 2d 349 (D. C. Cir. 1974). Accordingly, the ICFA contends that the Board erred in refusing to characterize the College's defenses and litigation as "patently frivolous," and that the Court of Appeals erred in concurring with that finding.

A review of the proceedings which have transpired in this case since the filing of the petition in December, 1977, clearly shows that the College's belated but main defense and complaint with respect to the Board's decisions is that the unit found to be appropriate is in fact an inappropriate one. This is a defense which apparently occurred to the College only after the Second Circuit's decision in *Yeshiva* and after the evidentiary record in the representation proceeding had been closed. The Federal Court proceeding in

which the College sought to enjoin the run-off election was founded entirely upon a contention that the unit in which the election had been directed was inappropriate. Also, a review of the record reflects that the issue of the appropriateness of the unit was raised before the Board in both the representation case and the subsequent unfair labor practice case only after the initial election in the certified unit had occurred.

The ICFA, on the other hand, contends that the unit determined to be appropriate by the Board is indeed an appropriate one, and that any objection the College had to the unit determination was either presented or could have been presented at the representation hearing conducted by the Regional Director in early 1978.

The employer had every opportunity, if it had so desired, to introduce whatever evidence it deemed necessary to establish that the unit consisting of faculty members at the College was not an appropriate one for bargaining. The rule that a party must raise unit determination issues at the representation hearing, and the corollary rule that if objections are not raised, the party is precluded from later raising that objection, is well settled, by both case law and by the Board's own rules and regulations.

The rules of the National Labor Relations Board, particularly 29 CFR §102.67(f), clearly state:

> "* * * failure to request review [of a Regional Director's Decision and Direction of Election] shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding * * *"

Here, the College did not seek review of the Regional Director's decision. Accordingly, the ICFA again relies on the concept of waiver which has already been discussed. The issue of the appropriateness of the unit was finally determined, at the very latest, when the Board stated on July 26, 1978, that the unit was appropriate. All of this was done prior to the College's attempts to relitigate the issue.

Despite the fact that the issue was settled, the College engaged in the several procedural maneuvers described above in order to relitigate the issue. As the NLRB said in its decision finding the College guilty of an unfair labor practice, that the College has "not raised any issue which is properly litigable in this unfair labor practice proceeding." It is submitted by the ICFA that, if the issues raised were not properly litigable in that proceeding, then, as a logical extension of that finding, the Board should have also determined that the issues raised by the employer were frivolous. In this respect, the Court should recognize that the Board did not comment upon the merits of the College's argument. Rather, the Board simply stated that those issues were not properly presentable in the proceeding. It should follow naturally that, if a party raises an issue which should not be raised within a particular forum, there should be a finding that the issue, if so raised, is presented frivolously. That is all that the ICFA asks for, and that is all that need be determined in order to entitle the ICFA to reimbursement for its attorneys fees.

The NLRB's decision was, in this respect, inconsistent, and the Second Circuit erred in upholding the Board on the issue. This Court should now grant this petition for a writ of certiorari in order to review those determinations.

This Court is the last available forum in which the employees of ICFA can argue for the protection of their statutory rights, and is respectfully requested to grant the petition.

Alternatively, if this Court finds that the record is inadequate for resolution of the issues, raised herein, the ICFA respectfully urges that the Court vacate the order of the United States Court of Appeals for the Second Circuit and remand the matter back to the NLRB for reconsideration or for such further proceedings it deems appropriate in light of the prior decisions of this Court.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD F. ASHE,
Attorney for Petitioner,
80 Wolf Road,
Albany, N. Y. 12205
(518) 459-5400.

ROCCO A. SOLIMANDO,
Of Counsel.

KEVIN H. HARREN,
Of Counsel.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 530, 536, 820—September Term, 1979.

(Argued February 22, 1980 Decided May 19, 1980.)

Docket Nos. 79-4150, 79-4176, 79-4210

ITHACA COLLEGE,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Intervenor.

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

ITHACA COLLEGE,

Intervenor.

Before:

MEDINA, MULLIGAN and MESKILL,
Circuit Judges.

Petitions for review and cross-petition for enforcement of a decision and order of the National Labor Relations Board finding petitioner Ithaca College in violation of Sections 8(a)(5) and (a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (a)(1), and denying petitioner Ithaca College Faculty Association's request for attorneys' fees.

Ithaca College's petition for review is granted and the proceedings are dismissed. Ithaca College Faculty Association's petition for review and the Board's cross-petition for enforcement are denied.

WILLIAM L. BERGAN, Syracuse, New York (Bond, Schoeneck & King, Syracuse, New York, Tracy H. Ferguson, of counsel), *for Petitioner-Intervenor Ithaca College.*

BERNARD F. ASHE, Albany, New York (Kevin H. Harren, Albany, New York, of counsel), *for Petitioner-Intervenor Ithaca College Faculty Association, NYSUT-AFT.*

CHARLES P. DONNELLY, Washington, D.C. (National Labor Relations Board, Washington, D.C., William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott

Moore, Deputy Associate General Counsel), *for Respondent*.

MULLIGAN, *Circuit Judge*:

On December 8, 1977, the Ithaca College Chapter of the American Association of University Professors (AAUP) filed a petition with the Regional Office of the National Labor Relations Board (the Board) for certification as the collective bargaining representative of the full-time and part-time faculty members of Ithaca College (the College). On February 3, 1978, the Regional Director issued a decision and directed an election in a unit consisting "of all full-time faculty members employed by Ithaca College at its Ithaca, New York location but excluding all . . . part-time faculty, and supervisors as defined in the [National Labor Relations] Act." The election was held on March 3, 1978 with the AAUP, the Ithaca College Faculty Association (ICFA), and "no union" as the choices. None of the three choices on the ballot received a majority of the votes cast and pursuant to the rules of the Board, a run-off election between the first and second choices, "no union" and the ICFA, was scheduled for September 29, 1978.

On July 31, 1978, this Court rendered its decision in *NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, ____ U.S. ____, 100 S.Ct. 856 (1980), which held that the full-time faculty at Yeshiva University were managerial or supervisory employees under the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq*. (1976), and were therefore ineligible for inclusion in a bargaining unit. In our opinion we indicated that the Board prece-

dents which had been routinely applied in cases involving faculty members in private institutions of higher learning were arbitrary and inconsistent with the Act.

Not surprisingly, on August 4, 1978, the College filed a motion for a rehearing requesting that the record be reopened in light of the *Yeshiva* decision. The response of the Regional Director was prompt and to the point. By letter dated August 25, he stated in relevant part:

> Your motion is denied. The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva*. In any case, whether the Board seeks review of this decision, or not, Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. For these reasons your motion is denied.

The College's request for review of the Regional Director's decision was denied by the Board on September 26, 1978 "as it raise[d] no substantial issues warranting review." While this request was pending, the College sought judicial intervention to postpone the run-off election and to order a hearing on the *Yeshiva* claim. This relief was denied for jurisdictional reasons. *Ithaca College v. Thomas W. Seeler, Regional Director, NLRB*, No. 78-CV-485 (N.D.N.Y. Sept. 26, 1978), motion for stay pending appeal denied, No. 78-6150 (2d Cir. Sept. 28, 1978).

The run-off election was conducted as scheduled on September 29, 1978, and ICFA won by a narrow margin, 116 votes to 109. The College tried to challenge each faculty vote to no avail. It then filed objections to the election, reasserting its challenge of the faculty votes based

on the *Yeshiva* decision, and alleging various other grounds for voiding the election which, given our disposition of this case, we need not detail. In a report issued on November 8, 1978, the Regional Director rejected each of the College's objections and recommended that the ICFA be certified as the bargaining representative of Ithaca's faculty. His report and recommendation were adopted by the Board in February of 1979.

The College, seeking to obtain review of its *Yeshiva* claim, refused to bargain with the ICFA, and on March 29, 1979, the Regional Director issued an unfair labor practice complaint alleging violations of sections 8(a)(5) and (a)(l) of the Act. The College answered by claiming, *inter alia*, that its full-time faculty members were managerial or supervisory employees under the Act. The General Counsel of the Board moved for summary judgment on the ground that the College was not raising any issues that had not already been determined during the representation proceedings. In opposition, the College submitted affidavits from the Deans of each of its Schools which in considerable detail pointed out tht the faculty possessed a large measure of authority over matters affecting academic policy. The affidavits showed that the faculty has effectively determined curricula and admissions standards, and has had an instrumental role to play in the creation and disbanding of several Schools within the College. In addition, the faculty has determined what teachers are to be hired, promoted, and tenured, and has participated in the selection of all of the Deans, a Vice President and the President of the College. In short, the affidavits were directed to the criteria held by this Court in *Yeshiva* to establish the managerial or supervisory status of full-time faculty members.

Thereafter, the General Counsel made a motion to transfer the proceedings to the Board, to strike the College's affirmative defenses, and to grant summary judgment. ICFA made a motion for the award of attorneys' fees. By Decision and Order dated August 22, 1979, and reported at 244 N.L.R.B. No. 54, the Board granted the General Counsel's motion, but denied ICFA's request for attorneys' fees on the ground that the College's defenses were not "patently frivolous." Responding to the College's continued reliance on the *Yeshiva* case, the Board, in a footnote, stated, "With all due respect to the view expressd by the Second Circuit in *Yeshiva*, *supra*, we shall adhere to our position until the Supreme Court has passed on the matter."

The case then came before this Court on petitions of the College and ICFA to review, and a cross-application of the Board to enforce, the order of the Board pursuant to sections 10(f) and 10(e) of the Act. Two days before oral argument was scheduled, the Supreme Court of the United States affirmed our decision in *Yeshiva*. *NLRB v. Yeshiva University*, ____ U.S. ____, 100 S.Ct. 856 (1980). During oral argument we asked for supplemental briefs addressed to the issue of what remedy was appropriate here in view of the Supreme Court affirmance. The Board now seeks a remand for further proceedings. ICFA still urges that we enforce the order and continues to ask for attorneys' fees. The College requests that we grant summary judgment in its favor and vacate the Board's order.

I

The Board has offered us several explanations for its refusal to conduct a hearing on whether the criteria set forth in this Court's *Yeshiva* opinion applied to Ithaca

College's faculty. We find none of these explanations acceptable.

First, the Board claims that the College's request for a hearing was untimely. The record belies that claim. The letter from the Regional Director denying the Board's motion for a rehearing made no mention of untimeliness, but rather, relied on the notion that "Regional Directors are bound to follow and apply Board rather than Court precedent. . . ." The history of the proceedings shows that the College was assiduous in its efforts to raise a *Yeshiva* claim. Moreover, if there truly was a procedural hurdle that prevented the hearing, the fact that the Supreme Court affirmed in *Yeshiva* should not have made any difference, and yet the Board is now willing to conduct a hearing.

Next, the Board argues that it was "not unreasonable" for it to deny a hearing given the fact that ICFA, and even the College, might have sought review in the Circuit for the District of Columbia instead of in the Second Circuit. Seesection 10(f) of the Act. However, the possibility that the D.C. Circuit would have been the court to review the Board's order was so remote that it does not seem likely that the Board actually considered it. Certainly the College was not going to seek review in the D.C. Circuit when it had a favorable precedent in the Second Circuit. And even if ICFA had petitioned for review in the D.C. Circuit first, the College could have moved to transfer the proceedings to the Second Circuit. 28 U.S.C. § 2112(a)(1976). Since most of the parties resided in the Second Circuit, and since ICFA's aggrievement with the Board's order was insignificant in comparison to the College's aggrievement, the transfer would have assuredly occurred. See *J.L. Simmons Co. v. NLRB*, 425 F.2d 52, 55-56 (7th Cir. 1970), transferred, 444 F.2d 895 (D.C. Cir.), cert. denied, 404 U.S. 986 (1971).

Third, the Board states that it did not consider it necessary to conduct a hearing during the proceedings below because it had not "acquiesced" in this Court's decision in *Yeshiva*. Apparently, it is a practice of the Board to refuse to follow unfavorable decisions from the Courts of Appeals even in instances such as this where it is likely that the case will come up for review before the very court with which the Board disagrees. See, e.g., *Bonanno Linen Service, Inc.*, 243 N.L.R.B. No. 140 (1979) (case originating in the lst Circuit, Board refusing to follow decisions of 2d, 3d, 5th, 8th, and 9th Circuits); *Allegheny General Hospital*, 239 N.L.R.B. No. 81 (1978), enforcement denied, 608 F.2d 965 (3d Cir. 1979) (case originating in 3d Circuit, Board refusing to follow decision of that Circuit); *Andrew G. Grutka*, 238 N.L.R.B. No. 216 (1978) (case originating in 7th Circuit, Board refusing to follow decision of that Circuit).

The position of the Board is one in which we cannot acquiesce. While deference is to be given to an agency's interpretation of the statute it administers, see *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978), it is the courts that have the final word on matters of statutory interpretation. See *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 565-66 (1979); *SEC v. Sloan*, 436 U.S. 103, 118-19 (1978); *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 272 (1968); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Safir v. Gibson*, 417 F.2d 972, 976 (2d Cir. 1969), cert. denied, 400 U.S. 850 (1970). "The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review is much akin to that of a United States District Court." *Morand Bros. Beverage v. NLRB*, 204 F.2d 529, 532 (7th

Cir.), cert. denied, 346 U.S. 909 (1953), and as must a district court, an agency is bound to follow the law of the Circuit. See *Mary Thompson Hospital, Inc. v. NLRB*, No. 79-1374 (7th Cir. March 5, 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979); *NLRB v. Gibson Products*, 494 F.2d 762, 766 (5th Cir. 1974); *Stacey Manufacturing Co. v. Commissioner*, 237 F.2d 605, 606 (6th Cir. 1956); *cf. Cleveland v. Federal Power Commission*, 561 (F.2d 344, 346 (D.C. Cir. 1977) (agency must follow law of the case).

Of course, we do not expect the Board or any other litigant to rejoice in all the opinions of this court. When it disagrees in a particular case, it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one. However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow. The Board cites no contrary authority except its own consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views. This is intolerable if the rule of law is to prevail.

As the Third Circuit has recently stated:

> A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial district. Thus our judgments . . . are binding on all inferior courts and litigants in the Third Judicial District, and also on administrative agencies when they deal with matters pertaining thereto. . . . [T]he Board is not a court nor is it equal to this court in matters of statu-

> tory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect. . . . For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.

Allegheny General Hospital, supra, 608 F.2d at 970.

Finally, the Board claims that this Court's *Yeshiva* decision dealt with "policy" and therefore was not binding on the Board. However, this Court's opinion in *Yeshiva* made clear that it was not deciding a question of policy, but rather, applying the language of the National Labor Relations Act in accordance with its prior judicial interpretations. See *Yeshiva*, *supra*, 582 F.2d at 697, 705. Indeed, "[t]his court has neither the expertise nor the constitutional authority to make 'policy' as that word is commonly understood. That role is reserved to the Congress and, within the bounds of delegated authority, to the [Board]. But in matters of interpreting the 'law' the final say is constitutionally committed to the judiciary." *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 854-55 (D.C. Cir. 1979) (en banc), *cert. granted*, ____ U.S. ____, 100 S.Ct. 1273 (1980) (citations omitted.)

We conclude that the Board's failure to conduct a hearing was arbitrary, capricious, and unlawful.

II

We thus come to the question of how we should dispose of this matter. ICFA has requested that we enforce the Board's order as though the Supreme Court had never affirmed *Yeshiva*. It is quite obvious that *Yeshiva* is applicable and even the Board no longer seeks enforcement of

its order. ICFA's claim for attorneys' fees was properly rejected by the Board. The continued claim of the College that the principles of *Yeshiva* be applied cannot without any show of reason be described as "frivolous", which is essentially the Board's test in deciding whether or not counsel fees are appropriate. See *Orion Corp.*, 210 N.L.R.B. 633 (1974), *aff'd*, 515 F.2d 81 (7th Cir. 1975).

Neither can we grant the College's request that summary judgment be granted in its favor. Although the College did not move for summary judgment in the proceedings below, the General Counsel of the Board did, and this Court clearly has the power to order the entry of summary judgment to the non-movant given the appropriate circumstances. *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 165 (2d Cir. 1971). This case, however, does not present the appropriate circumstances. As Moore notes in his Treatise, "[c]are should, of course, be taken by the [appellate] court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried." 6 Moore's Federal Practice ¶ 56.12 at 334 (1976). The General Counsel's motion for summary judgment below was predicated, and granted, on the notion that the College had not raised any new issues before the Board that it could not have raised during the representation hearing. The motion was addressed to that procedural issue; it was not concerned with the substantive issue of whether the faculty members at Ithaca College were managers. And all throughout the proceedings below, the Board's actions in refusing to acknowledge the *Yeshiva* decision effectively precluded ICFA from presenting its case on those grounds.

Nor do we grant the Board's request for a remand. Although we are empowered, we are not required to re-

mand. We may adjust our relief to the exigencies of the case in accordance with the equitable principles which govern judicial action. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373-74 (1939); *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir.), petition for rehearing denied, 542 F.2d 707, 709 (1976).

Here ICFA, whose interests are primarily at stake, has sought no remand, recognizes no factual issues, and in its supplemental brief filed after the Supreme Court's affirmance of *Yeshiva* and after oral argument still maintains that "the litigation in *Yeshiva* is of absolutely no import to this case." The Board had the opportunity to address the issue of faculty status and it improperly and arbitrarily refused to resolve that issue. This has exposed the College to needless expense and unwarranted prejudicial publicity. The election was close and hotly contested. The passage of time created by the Board's refusal to address these issues has undoubtedly been accompanied by changes in faculty personnel. All of these equitable factors, as well as the position of ICFA, lead us to conclude that a remand is here not appropriate. See *NLRB v. Producers Cooperative Assoc.*, 457 F.2d 1121 (10th Cir. 1972); *NLRB v. Sidron*, 181 F.2d 671 (5th Cir. 1950).

This determination is of course without prejudice to the right of ICFA, or any other group, to file a representation petition with the Regional Office of the Board seeking to represent whatever employee group it deems appropriate within the Act as interpreted by the Supreme Court in *Yeshiva*.

The College's petition for review is granted and the proceedings are dismissed. ICFA's petition for review and the Board's cross-petition for enforcement are denied.

APPENDIX "B"

FPT

244 NLRB No. 54

D—5452
Ithaca, NY

United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE

and

Case 3—CA—8962

ITHACA COLLEGE FACULTY
ASSOCIATION (I.C.F.A.)

DECISION AND ORDER

Upon a charge filed on February 23, 1979, by Ithaca College Faculty Association (I.C.F.A.), herein called the Association, and duly served on Ithaca College, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint and notice of hearing on March 29, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

The complaint alleges in substance that on January 31, 1979, following a Board election in Case 3—RC—7107,

the Association was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] that, commencing on or about February 12, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so; and that, since on or about February 9, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to supply the Association with certain requested information relevant to and necessary for the Association's performance as the collective-bargaining representative of the unit employees. On April 6, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 17, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 23, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause and, subsequently, the Association filed its brief in support of the General Counsel's motion and a request for extraordinary relief.

---

[1]Official notice is taken of the record in the representation proceeding, Case 3—RC—7107, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F. 2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F. 2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D. C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F. 2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint, Respondent admits that it has refused to bargain with the Association since February 16, 1979. However, Respondent contests the representative status of the Association on the grounds that (1) the full-time faculty members of the College are managerial and/or supervisory personnel and not employees within the meaning of Section 2(3) of the Act; (2) the Board's certification of the Association is without effect because the Board erred in adopting the Regional Director's findings and recommendations in the Report on Objections and Challenges dated November 8, 1978; and (3) the Board further erred by rejecting certain exceptions filed by Respondent to the Regional Director's Report on Objections and Challenges. With respect to the allegation that its refusal to supply certain information to the Association constitutes an additional violation of the Act, Respondent contends that the requested information, a list of names of those full-time faculty members being considered for promotion and/or tenure, pertains to a nonmandatory subject or bargaining and that the requested information was available to the Association through other sources. Consequently, Respondent contends that it has no legal obligation to furnish the requested information.

In support of the Motion for Summary Judgment, the General Counsel contends, *inter alia*, that Respondent is attempting to relitigate matters considered and disposed of in the prior representation proceeding. The General Counsel further contends that the requested information is relevant to the Association in discharging its statutory responsibilities as collective-bargaining representative of the unit employees.

Review of the entire record in this proceeding, including that in Case 3—RC—7107, establishes that pursuant to a Decision and Direction of Election, an election was held on March 3, 1978, in which the vote was 70 for Petitioner,[2] 74 for the Association, 98 against the participating labor organizations, and 10 challenged ballots. After an investigation, the Regional Director issued a Report on Challenged Ballots and Objections recommending that the objections be overruled and that five challenges be sustained and five challenges be overruled. On July 26, 1978, the Board issued an order adopting the Regional Director's report and directing the Regional Director to open and count five challenged ballots. The revised tally which issued showed 71 votes for Petitioner, 74 for the Association, and 104 against the participating labor organizations.

Because none of the choices received a majority in the initial election, pursuant to Section 102.70 of the Board's Rules and Regulations, Series 8, as amended, a run-off

[2]The petition was filed on December 8, 1977, by Ithaca College Chapter AAUP.

election was conducted on September 29, 1978.[3] Results of the run-off election showed 116 votes for the Association, 109 against, with 9 challenged ballots. The Employers filed objections and, on November 8, 1978, the Regional Director issued a Report on Objections and Challenges recommending that the Respondent's objections be overruled and that three of the challenges be overruled, leaving an insufficient number of challenges to affect the outcome of the run-off election. On January 31, 1979, the Board issued a Decision and Certification of Representative, adopting the Regional Director's findings and recommendations and certifying the Association. Thereafter, Respondent filed a motion for reconsideration which the Board denied on February 22, 1979.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

[3]Prior to the run-off election, Respondent filed a motion for rehearing, which was denied by the Regional Director on August 25, 1978, and on September 25, 1978, the Board denied Respondent's request for review of the Regional Director's denial of its motion. On or about September 15, 1978, Respondent attempted to withdraw the previously submitted *Excelsior* list on the ground that every individual named on that list was a supervisor and/or managerial employee. During the run-off election Respondent attempted to challenge the status of every voter on the same basis. In support of its motion for rehearing and attempted withdrawal of the *Excelsior* list, the Respondent relied on the Second Circuit Court of Appeals' ruling in *N.L.R.B. v. Yeshiva University*, 582 F. 2d 686 (1978), cert. granted 99 S. Ct. 1212 (1979). With all due respect to the view expressed by the Second Circuit in *Yeshiva, supra*, we shall adhere to our position until the Supreme Court has passed on the matter.

[4]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

With the exception of its defense to the allegation that it has refused to supply the Association with certain requested information, all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.

With respect to the request to supply information, Respondent concedes that the Association has requested a list of all full-time faculty members currently being considered for promotion and/or tenure. As the collective-bargaining representative for employees within the appropriate unit, the Association is entitled to information on the classification and seniority of each unit employee and to information concerning any changes in an employee's status. Consequently, we find that Respondent's affirmative defense to the allegation of refusal to supply information is without merit.

We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[5]

[5]The Association's request for extraordinary remedies is denied since we do not believe that the defenses raised by Respondent in this proceeding are patently frivolous.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT.

I. THE BUSINESS OF RESPONDENT

Respondent is a private, nonprofit institution of higher education, chartered by the State of New York, with its principal campus and headquarters at Ithaca, New York. Respondent derives annual gross revenues in excess of $1 million. In the course and conduct of its annual business operations, Respondent purchases, transfers, and delivers to the Ithaca, New York, campus goods and materials valued in excess of $50,000 which are transported to said campus directly from States of the United States other than the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Ithaca College Faculty Association (I.C.F.A.) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act.

2. The certification

On September 29, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 3, designated the Association as their representative for the purpose of collective bargaining with Respondent.

The Association was certified as the collective-bargaining representative of the employees in said unit on January 31, 1979, and the Association continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about January 31, 1979, and at all times thereafter, the Association has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the

above-described unit. Commencing on or about February 16, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Association as the exclusive representative for collective bargaining of all employees in said unit.

On or about February 6, 1979, the Association requested Respondent to furnish it with certain information relevant to and necessary for the Association's performance as the collective-bargaining representative of the unit employees. Since on or about February 9, 1979, and, at all times thereafter to date, Respondent has refused, and continues to refuse, to supply the Association with the requested information.

Accordingly, we find that Respondent has, since February 16, 1979, and at all times thereafter, refused to bargain collectively with the Association as the exclusive representative of the employees in the appropriate unit and, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. We further find that Respondent has, since February 9, 1979, and at all times thereafter, refused to supply the Association with certain requested information necessary for and relevant to the Association's performance as the collective-bargaining representative of the unit employees and, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations de-

scribed in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Association as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement. We shall further order Respondent to supply the Association, upon request, with information necessary for and relevant to the Association's performance of its function as the collective-bargaining representative of the unit employees.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Association as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (5th Cir. 1964), cert. denied 379 U. S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW.

1. Ithaca College is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Ithaca College Faculty Association (I.C.F.A.) is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time faculty members employed by Ithaca College at its Ithaca, New York, location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 31, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 16, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by refusing, on or about February 9, 1979, to supply the Association with certain requested information necessary for and relevant to the Association's performance as the collective-bargaining representative of the unit employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusals to bargain, and supply information, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices with the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ithaca College, Ithaca, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Ithaca College Faculty Association (I.C.F.A.) as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act.

(b) Refusing to provide the Association, upon request, information relevant to and necessary for its performance as the collective-bargaining representative of the unit employers *[sic]*.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement and provide the Association, upon request, a list of all full-time faculty members being considered for promotion and/or tenure and all other information relevant to and necessary for the Association's performance as the collective-bargaining representative of the unit employers *[sic]*.

(b) Post at its Ithaca, New York, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

---

[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. August 22, 1979

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX "C"

ITHACA COLLEGE

Employer

and Case No. 3—RC—7107

AAUP CHAPTER, ITHACA COLLEGE

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:[1]

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1]The Petitioner attached to its brief several appendices and included in its brief matters not introduced at, and evidence which was not offered at the hearing nor made a part of the record herein. Only those matters introduced at the hearing and made a part of the record can be considered in the determination made herein. Accordingly, only the evidence and exhibits made part of the record were considered in the determinations made herein. In view of the unit finding herein based on established Board precedent, the post-hearing material submitted by the Petitioner would not, in any event, alter the conclusions hereinafter set forth.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. The labor organization(s) involved claim to represent certain employees of the Employer.[3]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

---

[2]Ithaca College is a private non-profit institution of higher education, chartered in the State of New York with its principal campus and headquarters at Ithaca, New York.

Annually, Ithaca College derives gross revenues in excess of one million dollars exclusive of any contributions which, because of limitations by the grantor, are not available for operating expenses. Annually, Ithaca College purchases and receives goods and materials valued in excess of $5,000 at its New York location directly from points located outside the State of New York. The parties stipulated, and I find, that Ithaca College is engaged in commerce within the meaning of the Act.

[3]New York State United Teachers of Ithaca College Faculty Association was permitted to intervene at the hearing based upon an adequate showing of interest.

[4]Both Petitioner and Intervenor seek a unit consisting of all full time and all part-time faculty members employed by the Employer at its College in Ithaca, New York. The Employer contends that part-time faculty members should be excluded and that the only appropriate unit would consist of all full time faculty members.

The *Employer operates a* College located in Ithaca, New York, where it enrolled a total of 4,720 students as of the Fall semester, 1977. This total consists of 4,421 full time undergraduate students, 74 part-time undergraduate students, and 225 graduate and non-degree students.

The chief academic units of the College consist of the School of Humanities and Sciences, School of Music, School of Allied Health,

(Continued on following page)

(Footnote continued)

School of Health, Physical Education-Recreation, School of Business Administration, School of Communications, and the Center for Individual and Interdisciplinary Studies.

The Employer employs a total of 943 employees of which 279 are full time faculty and 107 are part-time faculty.

The governing authority of the Employer is vested in its Board of Trustees which consists of 25 members. The President of the College holds the Employer's chief executive position and reports directly to the Board of Trustees. The provost is the Chief Academic Officer of the College and reports directly to the President.

Dr. Frank Falcone, provost of Ithaca College, testified at the hearing, and explained, in detail, the existing differences in terms and conditions of employment between full time and part-time faculty at Ithaca College. Of the 279 full time faculty at the College 57 are professors, 100 are associate professors, 93 are assistant professors, 22 are instructors, and 1 is a lecturer. Of the 107 part-time faculty employed at Ithaca College, 1 is a professor, 2 are associate professors, 37 are assistant professors, 44 are instructors, and 23 are lecturers. As can be seen from the titular breakdown above, and as testified to by Dr. Falcone, the titles professor and associate professor are not ordinarily associated with part-time faculty, and, in a like manner, the title lecturer is not ordinarily associated with full time faculty. Likewise, full time faculty are ordinarily originally hired in the position of assistant professor after a national search in which an entire department of the College will be involved, while part-time faculty are ordinarily hired in the position of instructor or lecturer after a local or regional search conducted solely by a department chairman. In this regard, a terminal degree in the discipline to be taught is required of full time faculty members and is not a requirement for part-time faculty status.

Dr. Falcone also testified that full time faculty are required to engage in teaching, research, advising students, and service on College committees, while part-time faculty are only required to teach. With respect to teaching the record reveals that full time faculty carry an average annual teaching load of 24.4 credits and part-time faculty carry an average annual teaching load of 9.2 credits.

Dr. Falcone also testified to the following differences between full time faculty and part-time faculty:

1. *Tenure*—Ithaca College defines tenure as an offer of continuous employment for purposes of guaranteeing academic freedom. Tenure is granted by the Board of Trustees, normally after five or six years employment and is available only to full time faculty.

(Continued on following page)

(Footnote continued)

2. *Promotional Sequence*—Full time faculty are promoted from Instructor to Assistant Professor to Associate Professor to Professor. The Employer has no promotional sequence for part-time faculty.

3. *Notification of Termination of Faculty*—After the first year of employment, full time faculty must be given a full year notice if their contract will not be renewed. There is no such requirement for part-time faculty.

4. *Method of Compensation*—Full time faculty members are compensated on an annual salary basis regardless of the number of students taught or the number of courses carried. Part-time faculty are compensated either by an amount per course taught, an amount per student taught, a contract fee, or a fixed amount either annually or by the semester.

5. *Sabbatical Leave*—Full time faculty may take a fully paid sabbatical leave for the period of one semester or may take a full leave year at half pay. Part-time faculty are not entitled to sabbatical leave.

6. *Faculty Council*—The College maintains a faculty council which is a representative body serving in an advisory capacity to the College. Part-time faculty do not participate in this council.

7. *College-wide Standing Committee*—The College maintains a number of College-wide standing committees such as the tenure and promotion committee. Part-time faculty ordinarily do not serve on the committees.

In *New York University*, 205 NLRB 4, the Board, in reversing prior decisions, on the issue of inclusion of part-time faculty with full time faculty in collective bargaining units states: "We are now convinced that the differences between the full-time and part-time faculty are so substantial in most colleges and universities. . . we shall *exclude* all adjunct professors and part-time faculty members who are not employed in 'tenure track' positions."

Although the record contains the testimony of one witness that tends to establish some similarities in terms and conditions of employment between full time and part-time faculty, the entire record clearly reveals that whatever similarities there may be are heavily outweighed by the above-enumerated dissimilarities.

Accordingly, based on the foregoing, the record as a whole, and especially upon the fact that part-time faculty at Ithaca College are not in "tenure track" position, I shall exlude part-time faculty members.

All full time faculty members employed by Ithaca College at its Ithaca, New York location[5] but excluding all guards, confidential employees, part-time faculty, and supervisors[6] as defined in the Act.

DIRECTION OF ELECTION[7]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility

[5]The record reveals that the Employer maintains facilities in London, England, an affiliation with Broome County Community College, and an affiliation with Albert Einstein Hospital in New York City. Although it appears that the Employer employs employees including faculty at these locations, no party at the hearing raised a multi-location bargaining unit issue, but rather, they appear to agree that the appropriate unit should be limited to the Employer's Ithaca, New York location.

[6]The record reveals that the parties stipulated that Department Chairmen should be excluded from the unit if they are supervisors within the meaning of the Act. Inasmuch as the record does not reveal sufficient information upon which to base a conclusion on this issue, I shall permit Department Chairmen to vote subject to challenge by any party.

[7]In a post-hearing request, the Employer raised the issue of whether the Petitioner and Intervenor had a sufficient showing of interest to participate in the election in the event the part time employees are excluded from the unit. I am administratively satisfied that the Petitioner and Intervenor have a sufficient showing of interest in the unit found appropriate herein to participate in the election in the unit found appropriate herein.

period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by AAUP CHAPTER, ITHACA COLLEGE: or by NEW YORK STATE UNITED TEACHERS OF ITHACA COLLEGE FACULTY ASSOCIATION.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the National Labor Relations Board, Region Three, Federal Building, Room 901, 111 West Huron Street, Buffalo, New York 14202 on or before February 10, 1978. No extension of time to file this list may be granted, nor shall the filing of a request for review operate

to stay the filing of such list except in extraordinary circumstances, failure to comply with this requirement shall be grounds for setting aside the proper election whenever objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D. C. 20570. This request must be received by the Board in Washington by February 16, 1978.

Dated: February 3, 1978 at Buffalo, New York.

(Illegible)
Regional Director, Region Three

(Seal)

APPENDIX "D."

STIPULATION.

We the undersigned parties to the captioned case, hereby agree and stipulate that the Regional Director may amend the unit description set forth in his Decision and Direction of Election in the captioned case by also including in the bargaining unit employees of Ithaca College who are employed on a full time basis at Albert Einstein Medical Center in New York City.

Accordingly, it is agreed and stipulated by the parties hereto that the said unit description may be amended to read as follows:

> All full time faculty members employed by Ithaca College at its Ithaca, New York location and at the Albert Einstein Medical Center in New York City, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

The undersigned parties do hereby also agree and stipulate that the inclusion in the unit of the said employees at Ithaca College who are employed at the Albert Einstein Medical Center shall not, in part or in whole, be grounds for objections to conduct affecting the results of the election, and we hereby agree and stipulate

that the eligibility issues resolved herein are final and binding upon the parties.

ITHACA COLLEGE
(Employer)
Bond, Schoeneck & King
By William L. Bergan Date 2/13/78

AAUP CHAPTER, ITHACA COLLEGE
(Name of Organization)
By /s/ Charles J. Schneider Date 2/14/78

NEW YORK STATE UNITED TEACHERS OF ITHACA COLLEGE FACULTY ASSOCIATION
(Name of other Organization)
By /s/ Paul S. Mayo Date 2/14/78

Reommended:
(Illegible) Date 2/23/78
Date approved 2-23-78
(Illegible)
Regional Director
National Labor Relations Board
Case No. 3-RC-7107

APPENDIX "E."

ORDER DIRECTING REGIONAL DIRECTOR TO OPEN AND COUNT CHALLENGED BALLOTS

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer,

and

AAUP CHAPTER, ITHACA COLLEGE,

Petitioner.

Case 3-RC-7107

Pursuant to a Decision and Director of Election issued by the Regional Director for Region 3 of the National Labor Relations Board on February 3, 1978, an election by secret ballot was conducted in the above-entitled proceeding on March 3, 1978, under the direction and supervision of said Regional Director. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations.

The tally of ballots shows that there were approximately 283 elegible voters and that 256 ballots were cast, of which

70 were for the Petitioner, 74 were for the Intervenor,[1] 98 were against the participating labor organizations, 10 were challenged, and 4 were void.

The challenged ballots are sufficient in number to affect the results of the election and, on March 9, 1978, the Petitioner filed timely objections to the conduct of the election. The Regional Director caused a full and complete investigation of the challenged ballots and objections to be made and, thereafter, on April 27, 1978, issued and served on the parties his Report on Challenged Ballots and Objections. In his report, the Regional Director recommended to the Board that the Petitioner's objections be overruled in their entirety, that the challenges to 5 ballots be sustained, that the challenges to 5 ballots be overruled, that said ballots be opened and counted at a time and place subsequently to be determined, and that a revised tally of ballots be issued.

No exceptions to the Regional Director's report having been filed by any of the parties, the Board adopts the Regional Director's recommendations as contained in his report. Accordingly, the Petitioner's objections are hereby overruled in their entirety, the challenges to the ballots of Jeffry D. Bishop, Gordon E. Coggshall, Dr. David Hammond, Catherine Penner and E. William Terwilliger are hereby sustained, and the challenges to the ballots of Constantine Periales, Charles A. Kerr, William H. Ware, Carl Wickstrom and Fahri Unsel are hereby overruled.

IT IS HEREBY DIRECTED that, as part of the investigation to ascertain a representative for the purposes of collective bargaining among certain employees of Ithaca College, in the unit heretofore found appropriate, the Regional Director for Region 3 shall, pursuant to the Board's Rules and Regulations, at a time and place subsequently to be determined, open and count those ballots to

[1] Ithaca College Faculty Association, NYSUT-AFT.

which the challenges have been overruled and, thereafter, prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots, upon the basis of which he shall take such further action as he deems appropriate.

Dated, Washington, D.C., July 26, 1978.

By direction of the Board:

ROBERT VOLGER
Deputy Executive Secretary

APPENDIX "F."

DECISION AND CERTIFICATION OF REPRESENTATIVE.

Not Included in Bound Volumes

FPT Ithaca, N. Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer,

and

ITHACA COLLEGE AAUP CHAPTER,

Petitioner.

Case 3-RC-7107

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to a runoff elec-

tion held September 29, 1978,[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Regional Director's findings[2] and recommendations.

[1]The original election was conducted pursuant to a Decision and Direction of Election on March 3, 1978. Inasmuch as none of the choices received a majority of the valid votes cast in that election, a runoff election between the Intervenor, Ithaca College Faculty Association, NYSUT-AFT, and the choice of no representative was conducted on September 29. The tally of ballots showed that of approximately 252 eligible voters, 116 ballots were for the Petitioner, 109 ballots were cast against the participating labor organization, and there were 9 challenged ballots. The Regional Director recommended that the challenges to the ballots of Patricia Woodworth, Eric Robinson, George Valesente and Steve Ryan be sustained on the grounds that they were not employed in the appropriate unit as of the eligibility date, and further recommended that the ballots of Robert Button and Arthur Harry McCue be sustained on the grounds that they were emplyed part-time at the time of the eligibility date. With the exception of his recommendation on McCue, we hereby adopt the Regional Director's recommendations. Although evidence submitted by the Employer appears to establish that McCue, as Chairman of the Art Department, was a full-time faculty member at the time of the eligibility date, McCue's possible supervisory status precludes us from finding him eligible. In any event, since the number of remaining challenges, including McCue's, is insufficient in number to influence the results of the election, we find it unnecessary to determine McCue's elgibility.

[2]Although the Regional Director's Report indicates that the Board has considered and rejected the Employer's contention that its faculty members are supervisors or managerial employees, the Employer's request for review of the Regional Director's denial of its Motion for Rehearing was denied by the Board, by telegraphic order on September 26, 1978, only on the usual grounds that the motion raised no substantial issues warranting review.

Assuming *arguendo* that Chester Galaska was an agent of the Intervenor, we find that his alleged misrepresentation does not warrant setting aside the election. *General Knit of California, Inc.*, 239 NLRB No. 101 (1978); and *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962). Member Penello agrees that Galaska's alleged misrepresentation could not warrant setting aside the election for the reasons stated in *Shopping Kart Food Market*, 228 NLRB 1311 (1977), and his dissenting opinion in *General Knit, supra.*

CERTIFICATION OF REPRESENTATIVE.

It is hereby certified that a majority of the valid ballots have been cast for Ithaca College Faculty Association, NYSUT-AFT, and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York locations and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act.

Dated, Washington, D.C.
January 31, 1979

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member

(Seal) NATIONAL LABOR RELATIONS BOARD

No. 80-263

In The

Supreme Court of the United States

OCTOBER TERM, 1980

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and ITHACA COLLEGE,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT ITHACA COLLEGE'S BRIEF IN OPPOSITION

Submitted by:

TRACY H. FERGUSON, ESQ.
BOND, SCHOENECK & KING
Attorneys for Respondent Ithaca College
Office and Post Office Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

Of Counsel:
William L. Bergan, Esq.

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In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-263

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and ITHACA COLLEGE,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT ITHACA COLLEGE'S BRIEF IN OPPOSITION

Respondent Ithaca College respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's decision.

OPINIONS BELOW

The opinion of the Second Circuit is not yet offically reported. A copy of the opinion is appended to the petition as Appendix A.

A copy of the underlying decision and order of the National Labor Relations Board, 244 N.L.R.B. No. 54 (1979), is appended to the petition as Appendix B.

JURISDICTION

The judgment of the Second Circuit was entered on May 18, 1980. The petition states that jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. WHETHER THIS CASE WARRANTS THE EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION.

II. WHETHER THE SECOND CIRCUIT PROPERLY DENIED ENFORCEMENT OF THE NATIONAL LABOR RELATIONS BOARD'S BARGAINING ORDER.

III. WHETHER THE SECOND CIRCUIT PROPERLY DENIED REVIEW OF THE NATIONAL LABOR RELATIONS BOARD'S REFUSAL TO AWARD ATTORNEYS' FEES.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pages 1-5 of the petition.

REGULATIONS INVOLVED

Section 102.65(e)(1) of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.65(e)(1) (1979), states in relevant part:

> A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision for a reconsideration or rehearing ....

STATEMENT OF THE CASE

I. *Nature of the Case*

Petitioner, Ithaca College Faculty Association ("ICFA"), seeks to have this Court invoke its discretionary jurisdiction to review the decision of the Second Circuit denying enforcement of the National Labor Relations Board's ("NLRB" or "Board") order dated August 22, 1979, directing Ithaca College ("College") to negotiate with ICFA as the exclusive representative of the full-time faculty of the College. Petitioner also seeks review of the Second Circuit's enforcement of the NLRB's order denying attorneys' fees to ICFA.

The underlying representation proceedings in this case were commenced before the Second Circuit's decision in, and this Court's affirmance of, *NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, ____U.S.____, 100 S. Ct. 856 (1980). This case presents no questions concerning the substantive law articulated by this Court, or the Second Circuit, in the *Yeshiva* decisions. Rather, this case deals only with procedural issues that have arisen because the parties were in the midst of a representation proceeding when *Yeshiva* was decided by the Second Circuit.

II. *Statement of Facts*

In December, 1977, the American Association of University Professors Chapter of Ithaca College ("AAUP") filed a representation petition with the Board's Regional Director for the Third Region ("Regional Director") seeking recognition as the exclusive bargaining representative of the College's faculty. The Regional Director scheduled a unit determination hearing for January, 1978. ICFA intervened in that hearing, thereby becoming a party to the representation proceeding.

The Regional Director found that the appropriate unit for collective bargaining consisted of "all full-time faculty members employed by Ithaca College at its Ithaca, New York location but

excluding all . . . part-time faculty, and supervisors as defined by the Act." The Regional Director's Decision and Direction of Election, dated February 3, 1978, directed that an election be held. (Appendix C).[1]

By later stipulation among all parties, and with the approval of the Regional Director, the unit description was amended to include several inadvertently omitted full-time faculty members of the College located at the Albert Einstein Medical Center in New York City.[2] (Appendix 1).

In the election held on March 3, 1978, none of the voters' three choices (AAUP, ICFA, and "Neither Union") received a majority of the vote, and, following the resolution of various challenges and objections, a run-off election was scheduled for September 29, 1978 between the top two choices in the March election — ICFA and "No Union."

On July 31, 1978, well in advance of the run-off election date, the Second Circuit issued its decision in *NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978). The Second Circuit held that the "rigid criteria" applied by the Board in determining whether full-time faculty members at private colleges and universities were "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("the Act"), were "arbitrary," "unjustified," and inconsistent with the Act.

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[1]Lettered appendices are attached to the petition; numbered appendices are attached to this brief in opposition.

[2]ICFA attempts to characterize the stipulation as something more than a formal device by which the inadvertent exclusion of full-time faculty members employed at the Albert Einstein Medical Center was rectified. (Petition, at 17, 20). This attempt to mislead the Court is highly inappropriate. As the Board indicated in related correspondence, the stipulation merely amended the unit determination by including the full-time faculty members employed in New York City. (Appendix 1).

The Second Circuit's rejection of the Board's routinely applied precedent afforded the College its first meaningful opportunity to have the Board consider the managerial status of its full-time faculty. On August 24, 1978, the College petitioned the Regional Director in accordance with the Board's Rules and Regulations, 29 C.F.R. § 102.65(e)(1) (1979), for a hearing in which the principles established in *Yeshiva* would be applied to the College faculty. (Appendix 2).

Within twenty-four hours, the Regional Director rejected the College's petition, stating in relevant part:

> Your motion is denied. The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva. In any case, whether the Board seeks review of this decision, or not. Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. For these reasons your motion is denied.*

(Appendix 2, at 2-11) (emphasis supplied). The College's request for review of the Regional Director's determination, (Appendix 2, at 2-12), was denied by the Board on September 26, 1978, on the basis that it raised no "substantial issues warranting review." (Appendix 2, at 2-24).

While the request for review of the Regional Director's determination was pending before the Board, the College sought a temporary restraining order to postpone the run-off election pending a redetermination of the appropriateness of the unit under *Yeshiva* principles. For jurisdictional reasons unrelated to the College's *Yeshiva* claim, the request was denied by the United States District Court for the Northern District of New York, as was the College's application for an injunction pending an appeal to the Second Circuit. *Ithaca College v. Thomas W. Seeler, Regional Director, NLRB,* No. 78-CV-485 (N.D.N.Y. Sept.

26, 1978), *motion for stay pending appeal denied*, No. 78-6150 (2d Cir. Sept. 28, 1978).

In a further attempt to secure recognition of its *Yeshiva* claim, the College, on September 15, 1978, notified the Regional Director that it was withdrawing the voter eligibility (*Excelsior*) list. (Appendix 3). The withdrawal was not honored by the Regional Director.

The run-off election was held, as scheduled, on September 29, 1978; ICFA received 116 votes, "No-Union" 109 votes. The College had, based on *Yeshiva*, filed a timely challenge to the eligibility of each voter, but the Board agent conducting the election summarily rejected the challenges. (Appendix 4). The College then filed objections to the election, reasserting its *Yeshiva* claim.[3]

On November 8, 1978, the Regional Director issued a Report on Objections and Challenges, in which he stated that the College's *Yeshiva*-related contentions had been passed upon and rejected in the Board's September 26, 1978 denial of review of the Regional Director's decision rejecting the petition for reconsideration. Thereafter, the College timely filed exceptions to the Regional Director's Report with the Board. (Appendix 5).

A three-member panel of the Board adopted the Regional Director's ultimate findings and recommendations, but expressly rejected the portion of the Report that indicated that the Board had already resolved the College's *Yeshiva*-related claims. The Board reiterated that its September 26, 1978 order merely denied rehearing on the "usual grounds" that the motion raised no substantial issues warranting review. The College's motion for reconsideration of the Board's affirmance of the Report was denied on February 22, 1979.

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[3]The College urged several other grounds for voiding the election, which the Second Circuit did not have to pass upon in view of the disposition of the College's *Yeshiva* claims.

In a final administrative attempt to obtain review of its *Yeshiva* claim, the College refused to bargain with ICFA, which was the only procedural avenue remaining open to the College. Accordingly, ICFA filed an unfair labor practice charge on February 23, 1979 accusing the College of an unlawful refusal to bargain. A complaint and notice of hearing were issued by the Regional Director on March 29, 1979. In its answer to the complaint, the College asserted three affirmative defenses, including its defense that, based on *Yeshiva*, the managerial or supervisory status of its full-time faculty members precluded their being subject to the jurisdiction of the Board.[4] The College urged, therefore, that the Board certification of the unit for collective bargaining was without legal effect.

The Board's General Counsel made a motion to transfer the proceedings to the Board, to strike the College's affirmative defenses, and for summary judgment and issuance of the Board's decision and order. ICFA simultaneously moved the Board for extraordinary relief in the form of attorneys' fees.

By Decision and Order dated August 22, 1979, the Board granted the General Counsel's motion for summary judgment. As to the College's *Yeshiva* defense, the Board chronicled the College's attempts to obtain review of its *Yeshiva* claims at the representation stage and reaffirmed its view that it did not acquiesce in, or recognize as controlling, the Second Circuit's *Yeshiva* decision. (Appendix B, at B-5 & n.3). Having precluded litigation of the College's *Yeshiva* claims in the representation stage, the Board then invoked the so-called "no-relitigation" rule of *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941),[5] to

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[4]Only the College's *Yeshiva* defense is relevant on this petition for certiorari.

[5]*Pittsburgh Plate Glass*, read together with Board Rule and Regulation § 102.67(f), 29 C.F.R. § 102.67(f) (1979), prohibits relitigation, in an unfair labor practice proceeding, of issues that were or could have been litigated at the representation stage of the proceedings.

preclude consideration of the *Yeshiva* claims at the unfair labor practice stage. (Appendix B, at B-5 & n.4).

In the Decision and Order of August 22, 1979, the Board also rejected ICFA's request for attorneys' fees, finding that the College's *Yesiva* defenses were not "patently frivolous." (Appendix B, at B-6 n.5).

On August 23, 1979, the College petitioned the Second Circuit for review of the Board's bargaining order pursuant to section 10(f) of the Act, 29 U.S.C. § 160(f), and, on September 17, 1979, ICFA petitioned the Second Circuit for review of the Board's order denying attorneys' fees. The Board made a cross-application for enforcement of its orders.

Two days before the scheduled oral argument on the petitions and the cross-application, this Court affirmed the Second Circuit's decision in *Yeshiva. NLRB v. Yeshiva University,* ____U.S.____, 100 S. Ct. 856 (1980). During oral argument, the Second Circuit requested that the parties submit supplemental briefs addressing the subject of the appropriate remedy. In light of this Court's affirmance in *Yeshiva,* the Board requested a remand, but ICFA adhered to its position that the Board order to bargain should be enforced.

On May 19, 1980, the Second Circuit handed down its decision declining enforcement of the Board's order that the College bargain with ICFA and affirming that portion of the Board's decision denying ICFA's request for attorneys' fees. As to the order to bargain, the Second Circuit held that the Board had acted arbitrarily in refusing the College's petition for reconsideration in light of *Yeshiva,* thereby invalidating the underlying unit determination and certification of ICFA as the exclusive bargaining representative of the College's full-time faculty. Given the impact of the Board's conduct on the College, and having considered the parties' positions as to the appropriate remedy, the Second Circuit declined to remand the case to the Board. The Court made clear that its determination was without prejudice to the right of ICFA, or any other labor

organization, to file a representation petition with the Regional Director.

On August 19, 1980, ICFA filed its petition for a writ of certiorari with this Court seeking review of the Second Circuit's decision. On September 5, 1980, ICFA filed a new representation petition with the Regional Director, seeking once again to become the exclusive representative of the faculty members of the College. The new petition is being held in abeyance by the Regional Director pending the disposition of this petition for a writ of certiorari. (Appendix 6).

REASONS FOR DENYING THE WRIT

POINT I

THIS CASE DOES NOT WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION.

The substantive rule of law articulated by this Court in *NLRB v. Yeshiva University*, ____U.S.____, 100 S. Ct. 856 (1980), is not at issue in this case. Rather, by its petition for a writ of certiorari, ICFA seeks the exercise of this Court's discretionary jurisdiction to review issues related to the procedural side-effects of the significant change in law, which the *Yeshiva* decisions of the Second Circuit and this Court represent. These issues are relevant to a limited number of private colleges and universities and are lacking in the widespread significance that would warrant the exercise of certiorari jurisdiction.

When this Court decided *Yeshiva*, a number of private colleges and universities were at one of the various stages of the Board's representation proceedings,[6] thereby creating a transition class of colleges or universities that might seek Board review of

[6]In response to the College's inquiries, the Board and its thirty-three regional offices have reported that 18 such cases exist. The August 25, 1980 Chronicle of Higher Education reports that approximately 30 post-*Yeshiva* cases are currently pending. Chronicle of Higher Education, Aug. 25, 1980, at 7, col. 2.

faculty status in light of the new principles established in *Yeshiva*. The specific legal question presented to, and resolved by, the Second Circuit in this case, however, is not common to, and does not have significance for, the entire transition class. Rather, it has significance only for a very limited sub-group of private colleges and universities within this transition class that was confronted with an earlier transition period when the Second Circuit changed the law with its *Yeshiva* decision.

Because *Yeshiva* was the controlling law of the Second Circuit before this Court's affirmance, there arose a legal question as to the applicability of the Second Circuit's decision to private colleges and universities within the jurisdiction of the Second Circuit that were in the midst of the Board's representation process when the law of the Second Circuit changed: how must the Board dispose of requests for reconsideration of faculty status, where the requests were premised on the *Yeshiva* decision of the Second Circuit.

The essential factor distinguishing the sub-group from the overall transition class is that, in dealing with members of the sub-group, the Board was constrained by the law of *Yeshiva* in the Second Circuit. The issues presented to this Court for review have significance only for those colleges and universities that could have availed themselves of the law of the Second Circuit as a basis for their request to the Board for reconsideration, *i.e.*, only the members of the sub-group of the already narrow transition class.[7]

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[7]The College is aware of only one case, other than its own, which might fall within this sub-group of transition cases. A representation hearing was held in the Daemen College case after the Second Circuit's decision in *Yeshiva*. The college adduced *Yeshiva*-type evidence and urged that all of its faculty members were excluded from coverage of the Act as managerial or supervisory employees. The Regional Director for the Third Region refused to abide by the *Yeshiva* decision. *Daemen College, Decision and Direction of Election*, 3-RC-7530 (August 24, 1979). The union prevailed in the election and the college refused to bargain. On the General Counsel's motion for summary judgment on the unfair labor practice charge, the case was transferred to the Board where it is now pending.

ICFA attempts to portray the issues presented by this case as having significance beyond the sub-group and as being of widespread public importance. Contrary to ICFA's assertions, however, this case does not raise questions concerning proper application of the substantial evidence test, nor does it raise questions concerning the "no-relitigation" rule of *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146 (1941). The Second Circuit has not deviated from established precedent of this Court on these issues. In fact, the Second Circuit was not called upon to consider either of these issues.[8] Rather, the Second Circuit was faced with the legal question of whether the Board properly refused consideration of the College's *Yeshiva* claims.

Because the issues presented to this Court are peculiar to, and do not transcend, the narrow sub-group, they are not of such widespread importance that it is "in the public interest to have them decided by this Court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). With one possible exception of which the College is aware,[9] the resolution of the issues presented by the petition are of importance only to the parties to this litigation. As this Court has stated, it is important that a writ of certiorari not issue "except in cases involving principles, the settlement of which is of importance to the public, as distinguished from the parties ...." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1922).

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[8]See Point II, A, 1, *infra*.

[9]See footnote 7.

POINT II

THE SECOND CIRCUIT PROPERLY DENIED ENFORCEMENT OF THE BOARD'S ORDER TO BARGAIN.

A. *The Second Circuit Properly Refused Enforcement of the NLRB's Order to Bargain Because the Board Arbitrarily and Capriciously Refused to Follow the Controlling Law of the Second Circuit.*

1. *There Was No Substantial Evidence Question Before the Second Circuit.*

The Second Circuit refused to enforce the Board's order to bargain because it found the Board's refusal to grant reconsideration in light of *Yeshiva* to be arbitrary and capricious. (Appendix A, at A-10). Petitioner urges that the finding of an arbitrary and capricious refusal to conduct a hearing was made in derogation of the substantial evidence test of *Universal Camera v. NLRB*, 340 U.S. 474 (1951). (Petition, at 16).

Petitioner reasons that the NLRB found, pursuant to the "no-relitigation" rule of *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146 (1941), that the College waived its right to litigate its *Yeshiva* claims *at the unfair labor practice proceeding*. (Petition, at 18-19). Based on that Board finding, Petitioner asserts that substantial evidence on the record bound the Second Circuit to conclude that the Board relied on an untimeliness theory in refusing to conduct a hearing at the *representation stage* of this case. (Petition, at 19). Accordingly, Petitioner argues that the rule of *Universal Camera* has been breached by the Second Circuit.

Petitioner's argument is misguided in that it ignores the distinction between the Board's reasons for refusing consideration of the College's *Yeshiva* claims at the representation stage and the Board's reasons for denying consideration at the unfair labor practice stage.

During the representation stage, the College took every conceivable step to obtain consideration of its *Yeshiva* claims. It petitioned for reconsideration of the unit determination shortly after the Second Circuit's *Yeshiva* decision, sought a temporary restraining order, attempted to withdraw the voter eligibility list, challenged each voter at the run-off election, and filed objections to the election. The College was rebuked by the Board at each step. It was only after the Board refused to allow consideration of the College's *Yeshiva* claims at any and all available junctures in the representation process that the College resorted to a technical refusal to bargain in order to obtain judicial review of its claims.

In the unfair labor practice proceedings, the NLRB again refused to consider the *Yeshiva* claim. The Board held that, since the issue could have been litigated in the prior representation proceeding, the College was, pursuant to the rule of *Pittsburgh Plate Glass, supra,* barred from relitigating it at the unfair labor practice stage.[10] (Appendix B, at B-5, B-6).

Contrary to Petitioner's assertions, the *Pittsburgh Plate Glass* rule was wholly irrelevant to the Second Circuit's resolution of this case. The issue for the Second Circuit was the reason for, and the propriety of, the Board's refusal to consider the College's *Yeshiva* claims at the representation stage. The Second Circuit held that the denial of the request for reconsideration of the College's *Yeshiva* claims during the representation stage was based on the Board's refusal to acquiesce in the law of the Second Circuit, and that such a denial constituted arbitrary and capricious Board action. (Appendix A, at A-10). Only by virtue of the improper denial of reconsideration at the representation stage was the College placed in the position of not having litigated the *Yeshiva* issue when the question was raised in the unfair labor practice proceedings. Accordingly, the

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[10]The Board also cited sections 102.67(f) and 102.69(c) of its Rules and Regulations.

rule of *Pittsburgh Plate Glass* has no bearing on the issues presented for review.

The Second Circuit was not, therefore, faced with a substantial evidence question, but with the legal question of determining the propriety of the Board's reasons for denying the petition for reconsideration.

2. *The Second Circuit Properly Rejected the Board's Post-Hoc Rationalizations and Held that Denial of Reconsideration was Based on Nonacquiescence in the Law of the Second Circuit.*

In assessing the legal question of the Board's reasons for denying the College's petition for reconsideration, the Second Circuit was confronted with the Board's after-the-fact assertion that the denial was based on the untimeliness of the College's request. The court held, in essence, that this post-hoc rationalization was not supported by the reasons advanced for the denial at the time the denial was made.[11] (Appendix A, at A-7). The court found instead that the Board arbitrarily and capriciously based denial on the "notion that 'Regional Directors are bound to follow and apply Board rather than Court precedent . . . .' " (Appendix A, at A-7).

It is beyond dispute that the Second Circuit's conclusions were correct. The Regional Director clearly and unequivocally stated the basis for his refusal to consider the College's *Yeshiva* claims in denying the College's August 24, 1978 petition for reconsideration:

> The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva*. In any case, whether

[11]The Second Circuit intimated that, had the Board truly relied on timeliness at the representation stage, its action would have been set aside nonetheless. "The history of the proceedings shows that the College was assiduous in its efforts to raise a *Yeshiva* claim." (Appendix A, at A-7).

> the Board seeks review of this decision, or not, Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. *For these reasons your motion is denied.*

(Appendix 2, at 2-11) (emphasis supplied). In its September 26, 1978, denial of the College's request for review of the Regional Director's determination, the Board approved the basis for denial, finding that there existed no substantial issues warranting review. (Appendix 2, at 2-24).

At no time in advance of review before the Second Circuit did the Board indicate, expressly or otherwise, that the College's request for consideration of its *Yeshiva* claims during the representation stage had been denied because the request was made in an untimely fashion. In fact, in its decision finding that the College had violated section 8(a)(5) of the Act, the Board confirmed that denial of consideration was based on its nonacquiescence policy:

> In support of its motion for rehearing and attempted withdrawal of the *Excelsior* list, the College relied on the Second Circuit Court of Appeals' ruling in *N.L.R.B. v. Yeshiva University.* With all due respect to the view expressed by the Second Circuit in *Yeshiva* . . . we shall adhere to our position until the Supreme Court has passed on the matter. [citations omitted].

(Appendix B, at B-5 n.3).

The Second Circuit acted properly in examining the Board's stated reasons for its refusal to grant consideration of the *Yeshiva* claims and in rejecting the Board counsel's post-hoc assertion that denial was based on the alleged untimeliness of the request. This Court has recently reaffirmed the longstanding principle of review of Board action that a court will not "substitute counsel's post-hoc rationale for the reasoning supplied by the Board itself." *NLRB v. Yeshiva University,* ____U.S.____,

100 S. Ct. 856, 864 n.22 (1980) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

In fact, the Board's position before the Second Circuit belied the claim that its refusal to grant consideration of the College's *Yeshiva* claims was based on any alleged untimeliness. As the Second Circuit stated, the Board's request for a remand of the case, which was made after this Court's affirmance of *Yeshiva*, was inconsistent with the untimeliness rationale:

> [I]f there truly was a procedural hurdle that prevented the hearing [of the College's *Yeshiva* claims], the fact that the Supreme Court affirmed in *Yeshiva* should not have made any difference, and yet the Board is now willing to conduct a hearing.[12]

(Appendix A, at A-7).

3. *The Second Circuit Properly Held that the Board's Adherence to its Nonacquiescence Policy was an Arbitrary and Capricious Basis for Refusing Reconsideration.*

Having found that the Board refused the College's petition for reconsideration on the basis of its nonacquiescence policy, the Second Circuit held that the refusal constituted arbitrary, capricious, and improper Board action, which invalidated the finding of an unfair labor practice, as well as the underlying unit determination. (Appendix A). The Board's action was set aside because it was premised on the belief that the Board was not

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[12]Incredibly, Petitioner quotes this passage from the Second Circuit's decision in support of its argument that the Second Circuit ignored the Board's "factual finding" of a waiver and in support of Petitioner's contention that the Board's nonacquiescence policy has "nothing to do with the instant case." (Petition, at 19-20). Respondent respectfully submits that Petitioner has grossly misapprehended the plain meaning of the Second Circuit's discussion of the Board's attempt to advance the timeliness theory as a justification for its actions.

bound to follow the law of the circuit in which it sought enforcement of its order. (Appendix A, at A-9).

The Board's nonacquiescence policy conflicts with fundamental principles of judicial review of agency action. Simply stated, "an agency is bound to follow the law of the Circuit." (Appendix A, at A-9). " 'Thus, a disagreement by the NLRB with a decision of [a court of appeals] is simply an academic exercise that possesses no authoritative effect.... For the Board to predicate an order on its disagreement with [the] court's interpretation of a statute is for it to operate outside the law.' " (Appendix A, at A-10 (quoting *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3d Cir.1979)).

The Second Circuit's rejection of the Board's nonacquiescence policy was essential "if the rule of law is to prevail," and it comports with the treatment given to the policy by other courts of appeals. (Appendix A, at A-9); *see Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979); *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979); *NLRB v. Wilson Freight*, 604 F.2d 712 (1st Cir. 1979), *cert. denied*, ____U.S.____, 100 S. Ct. 1650 (1980); *Sun Oil Co. v. NLRB*, 576 F.2d 553 (3d Cir. 1978); *Coletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292 (1st Cir. 1977); *NLRB v. Gibson Products Co.*, 494 F.2d 762 (5th Cir. 1974).

B. *Even if the Board Had Refused Reconsideration on an Untimeliness Theory, the Intervening* Yeshiva *Decisions Constituted an "Extraordinary Circumstance" Excusing Any Possible Waiver.*

The Board's after-the-fact assertion that the College's request for reconsideration was denied as untimely was properly rejected by the Second Circuit.[13] Even if the Board had rejected the College's requests as untimely, however, a proper application of the law would have required the Second Circuit to deny enforcement of the Board's order.

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[13]See Point II, A, 2, *supra*.

In its petition for reconsideration of the Regional Director's unit determination, which was made pursuant to section 102.65(e)(1) of the Board's Rules and Regulations, 29 C.F.R. § 102.65(e)(1) (1979), the College alleged the existence of "extraordinary circumstances" that would warrant reconsideration. (Appendix 2, at 2-7, 2-13). The College argued that the Second Circuit's *Yeshiva* decision constituted an "extraordinary circumstance" in that it reversed the longstanding precedent of the Board that faculty members were "employees" within the meaning of the Act, *see Northeastern University*, 218 N.L.R.B. 247 (1975); *University of Miami*, 213 N.L.R.B. 634 (1974); *Fordham University*, 193 N.L.R.B. 134 (1971); *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971), and afforded the College its first meaningful opportunity to have considered evidence establishing the managerial status of full-time faculty members. (Appendix 2, at 2-7, 2-13).

If the request for rehearing had been denied as "untimely," the Board would have to have ruled on the "extraordinary circumstance" provision of section 102.65(e)(1). Indeed, if the Board had sought to justify "untimeliness" as the basis for denial, it would have been required to establish that the change in the law, which *Yeshiva* represents, did not constitute an "extraordinary circumstance."

Section 102.65(e)(1) of the Board's Rules and Regulations does not define the phrase "extraordinary circumstance," yet, decisional law interpreting a similar use of the phrase in section 10(e) of the Act, 29 U.S.C. § 160(e), makes clear that a reversal of longstanding Board precedent is within the meaning of the phrase.

Section 10(e) provides that "[n]o objection that has not been urged before the Board shall be considered by the [Court of Appeals] unless the failure ... to urge such objection shall be excused because of extraordinary circumstances ...." 29 U.S.C. § 160(e). In *NLRB v. Lundy Manufacturing Corp.*, 286 F.2d 424 (2d Cir. 1960), the Second Circuit reviewed a Board finding that

the employer had committed an unfair labor practice. The Board's finding was premised on the law as stated in an earlier Board decision in *Bryan Manufacturing*, 119 N.L.R.B. 502, *enf'd*, 264 F.2d 575 (D.C. Cir. 1965). After the unfair labor practice proceeding in *Lundy*, but before Second Circuit review, *Bryan Manufacturing* was reversed by this Court *sub nom. Local Lodge No. 1424, IAM v. NLRB*, 362 U.S. 411 (1960), thereby changing the prevailing precedent that had governed the proceedings before the Board.

Before the Second Circuit in *Lundy*, the employer urged, for the first time, the change in law as a basis for denying enforcement of the Board's order. The Board argued that, under section 10(e), the employer's failure to question *Bryan Manufacturing* before the Board precluded the employer from raising the issue before the Second Circuit. In rejecting the Board's argument, Judge Friendly stated:

> [I]t is not fatal that Respondent did not include among its arguments a specific criticism, necessarily futile at that stage, of a pertinent Board decision which had been enforced by a Court of Appeals .... [Because of the intervening reversal] ... the case would surely be one where "the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." [citations omitted]

286 F.2d at 426.

In the case at hand, the dramatic reversal of longstanding Board precedent, which this Court's and the Second Circuit's *Yeshiva* decisions represent, likewise compels the conclusion that an "extraordinary circumstance" warranting reconsideration pursuant to section 102.65(e)(1) existed.[14]

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[14] In *Stephens Institute v. NLRB*, 620 F.2d 720, 727 (9th Cir. 1980), *petition for writ of cert. pending*, No. 80-307, the employer argued that this Court's *Yeshiva* decision constituted an "extraordinary circumstance" excusing the Institute's failure to raise the issue of managerial status before the Board.

Footnote continued on next page—

The decision of the Third Circuit in *NLRB v. Beck Engraving Co.* 522 F.2d 475 (3d Cir. 1975), reaffirms the *Lundy* holding that a change in pre-existing decisional law constitutes an "extraordinary circumstance." In *Beck,* which is factually more analogous to the case at hand than is *Lundy,* the employer petitioned the Board for reconsideration of an unfair labor practice decision. The basis for the employer's request for reconsideration was the intervening change in the law of two circuit courts of appeals with regard to the "impasse doctrine." 522 F.2d at 479 n.8. The Board denied the employer's request.

The Third Circuit, after holding that the request for reconsideration properly placed the impasse issue before the Board and precluded the finding of a section 10(e) waiver, held that the Board improperly denied the request for reconsideration. 522 F.2d at 479 n.8. The court found that the changes in the decisional law constituted circumstances excusing the failure to

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Inexplicably, the Ninth Circuit stated that, ordinarily, pronouncements of the United States Supreme Court would constitute "extraordinary circumstances" excusing a section 10(e) waiver, but that *Yeshiva* was not such a case. The court then proceeded to examine the available evidence and concluded that Stephens Institute was not a "mature" university whose faculty had a "policy making role." 620 F.2d at 727. It is anomalous that the Ninth Circuit first held that the section 10(e) waiver was not excused and then immediately proceeded to resolve the very issues that could only be reached in the enforcement stage if the waiver had been excused. If the Ninth Circuit had truly intended to find that the *Yeshiva* decision was not an "extraordinary circumstance," it would never have evaluated the evidence as to managerial status (which evidence was, apparently, submitted to the court in the supplemental documentation referred to in the opinion). Respondent can only conclude that the Ninth Circuit mistakenly stated that *Yeshiva* did not constitute an "extraordinary circumstance," intending instead to conclude that the existence of this extraordinary circumstance did not work to the Institute's benefit because the faculty did not meet the prerequisites of managerial status and because the Institute was not akin to the type of institution of higher learning that Yeshiva University represents.

raise the impasse doctrine in the initial unfair labor practice proceeding.

Beck is factually more analogous to the present case because, unlike *Lundy*, the court was construing the phrase "extraordinary circumstances" as found in the Board's Rules and Regulations governing the grounds for reconsideration rather than as found in section 10(e). The *Beck* motion for reconsideration was made pursuant to section 102.48(d)(1), which deals with requests for rehearing in unfair labor practice cases. The College's request for reconsideration was made pursuant to section 102.65(e)(1), which deals with requests for reconsideration in representation proceedings. Both sections of the Board's Rules and Regulations provide that reconsideration is appropriate where the request is made "because of extraordinary circumstances."

The analogy to the *Lundy* treatment of the section 10(e) "extraordinary circumstances" exception to the waiver rule is apt; the analogy to the *Beck* court's holding under a similar provision of the Board's own Rules and Regulations is compelling.

The change in law that the *Yeshiva* decisions of this Court and the Second Circuit represent is an "extraordinary circumstance" within the meaning of section 102.65(e)(1). Accordingly, had the Board actually relied on an untimeliness theory in rejecting the College's petition for reconsideration, its refusal would have been arbitrary and capricious because the untimeliness would have been excused given the existence of an extraordinary circumstance. In that event, the Board's order would not have been enforced by the Second Circuit.

C. *The Second Circuit's Refusal to Enforce the Board's Bargaining Order Was the Appropriate Remedy Given the Facts and Circumstances of This Case.*

Based on the waiver theory advanced in its petition, ICFA argues that certiorari should be granted to review the Second Circuit's denial of enforcement of the Board's bargaining order.[15] It appears, although it is less than clear, that in the alternative Petitioner seeks a grant of certiorari to review the appropriateness of the Second Circuit's remedy. Petitioner seems to be arguing that, if the Second Circuit properly found that the Board acted arbitrarily and capriciously, the court should have remanded the case to the Board for reconsideration in light of *Yeshiva* rather than simply deny enforcement of the order.[16]

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[15]In light of this Court's remand of *Trustees of Boston University v. NLRB*, ____U.S.____, 48 U.S.L.W. 3568 (March 4, 1980), it is anomalous for ICFA to urge that the Board order be enforced. In *Boston University*, this Court vacated the First Circuit's enforcement of the Board's bargaining order and directed reconsideration in light of *Yeshiva*. The holding in *Boston University* established that the underlying unit determination could not stand given the change in law that *Yeshiva* represents. This reasoning applies with equal force in the case at hand. If the unit determination is invalid, the Board's order requiring the College to bargain with ICFA is unenforceable.

[16]Petitioner's request for a remand is extremely ambiguous. First, a request for relief in the nature of remand is not appropriately advanced in a petition for a writ of certiorari. Clearly, at this stage in the proceeding, Petitioner should be addressing the question of whether there exist issues warranting the exercise of certiorari jurisdiction. Second, given the form of the discussion of the remand issue, Respondent cannot ascertain whether Petitioner intended to take the position that, if its waiver theory is not deemed worthy of review, the appropriateness of the remedy issue nevertheless is, or whether Petitioner's intent was to assert that a remand would be warranted to augment the record as to the existence of an NLRB finding of waiver. The latter position would contradict Petitioner's assertion that there exists substantial record evidence supporting the Board's reliance on waiver, while the former position would be wholly inconsistent with Petitioner's position before this Court and the Second Circuit that *Yeshiva* is irrelevant to this case and that reconsideration in light of *Yeshiva* would,

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The College respectfully submits that the Second Circuit's refusal to grant remand was not an abuse of the court's discretion and that this Court should not grant certiorari to review the choice of remedy where there has been no abuse of discretion. *See NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 30 (1943).

Congress vested in the courts of appeals broad remedial powers for reviewing orders of the NLRB. On a petition by the Board to enforce an order, or on a petition by an aggrieved party for review of a Board order, the court is empowered to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . ." 29 U.S.C. § 160(e), (f). It has long been settled that

> [t]*he jurisdiction to review the orders of the . . . Board is vested in a court with equity powers*, and while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.*

Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939) (emphasis supplied). There is no question that, having found the Board's failure to conduct a hearing to be arbitrary and improper, the Second Circuit was correct in denying ICFA's request that the order be enforced. As this Court has stated: "Courts [of appeals] must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.' " *NLRB v. Brown*, 380 U.S. 278, 292

—*Footnote continued from preceding page*

therefore, be inappropriate. Third, if Respondent has correctly assumed that Petitioner intended to persuade this Court that the remedy question is one warranting review on certiorari, the petition is devoid of any discussion of law or fact supporting the view that the Second Circuit abused its discretion by not granting a remand. With due respect to counsel for the Petitioner, the request for remand is so worded as to leave unidentified the referenced-to "prior decisions of this Court," the "issues" raised herein, and the nature of the questions it seeks to have "reconsidered" or subjected to "further proceedings." (Petition, at 25).

(1965); *see also, Trustees of Boston University v. NLRB*, ____U.S.____, 48 U.S.L.W. 3568 (March 4, 1980).

With regard to the question of remand, the Second Circuit was not bound to deem it the appropriate remedy. *See NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 709 (7th Cir. 1976). In rejecting remand, the Second Circuit focused on the equitable factors present in this case.

First, the Board had the opportunity to address the issue of faculty status when the College requested reconsideration in light of the Second Circuit's *Yeshiva* decision. Only the Board's refusal to consider the issue at that relatively early stage of the representation proceedings forced the College to seek court review by way of unfair labor practice proceedings. The Board's subsequent change of heart, in light of this Court's affirmance in *Yeshiva*, came too late to justify a remand to do what properly should have been done on the College's motion for reconsideration. (Appendix A, at A-12). *See NLRB v. Colonial New Haven Nursing Home*, 542 F.2d at 710-11.

Second, ICFA, whose interests the court noted were "primarily at stake" in these proceedings, at no time sought a remand of the case to the Board. ICFA was absolute in its position below: neither the Second Circuit's nor this Court's *Yeshiva* decisions had any bearing on the case. By its request for alternative relief in this petition, ICFA appears to urge this Court to grant review of the Second Circuit's denial of a remedy that ICFA chose not to seek below. ICFA's request for remand at this late stage cannot alter the fact that it never took the position before the Second Circuit that remand was appropriate to protect its interests.

Third, the Board's arbitrary and improper refusal to grant a hearing "has exposed the College to needless expense and unwarranted prejudicial publicity."[17] (Appendix A, at A-12). The

[17]In its supplemental brief to the Second Circuit on the remedy issue, the College submitted for the Second Circuit's review numerous newspaper articles and editorials disseminated in Ithaca, New York and surrounding communities.

Second Circuit was keenly aware of the prejudice to the College that the Board's single-minded and improper refusal to grant a hearing had caused and which a remand would perpetuate.

The Board flouted the law of the Second Circuit, impervious to the impact of its decision on the College. While notions of administrative convenience and independence may have been sufficient justification from the Board's perspective, adherence to the nonacquiesence policy caused the College to suffer severe and widely publicized criticism. The College's repeated attempts to force compliance with the law of the Second Circuit were viewed, because of frequent mischaracterizations, as efforts to avoid legal obligations. The integrity and credibility of the College were impeached at the hands of the Board and with the expected encouragement of ICFA. The reality of the Board's failure to abide by the controlling law was unrecognized or, at least, overlooked. Instead, community attention was focused on the College's efforts to force the Board to recognize the law. The community, within which the College sits as an institution responsible for instilling moral and civil values of the highest order, viewed the institution as a law breaker.

All of this came as a direct result of the Board's adherence to its nonacquiescence policy, the basic tenet of which is that the NLRB need not follow the law of the federal circuit courts of appeals.

The Second Circuit recognized that remand would not be justified in light of these factors. The court did not, however, consider these factors to the exclusion of the interests of ICFA. The denial of remand did not impair ICFA's right to file a new representation petition with the Regional Director. A new petition, which ICFA has in fact filed while this case is pending before the Court, was astutely recognized by the Second Circuit as being preferable to a remand for rehearing. On remand, the required "showing of interest" would have been that which had been obtained in 1977 – an undesirable state of affairs given the

lapse of time and change of faculty personnel at the College. (Appendix A, at A-12).

Having acted within the bounds of the statute and having appropriately considered the exigencies of the case, it is respectfully submitted that the Second Circuit has not abused its discretion[18] in denying a remand. Accordingly, Petitioner's request for a grant of certiorari to review the selection of remedy is not warranted.

POINT III

THE SECOND CIRCUIT PROPERLY DENIED REVIEW OF THE BOARD'S ORDER DENYING ATTORNEYS' FEES.

In its motion in support of the General Counsel's motion for summary judgment against the College for alleged section 8(a)(5) violations, Petitioner requested extraordinary relief in the nature of attorneys' fees for expenses incurred during the processing of the underlying representation and the unfair labor practice cases. (Petition, at 11). The Board, while affirming the denial of the College's various requests to have its *Yeshiva* claims considered, did not award attorneys' fees. (Appendix B, at B-5 n.5). The Second Circuit enforced the Board's order denying extraordinary relief.

Petitioner would have this Court grant review on the theory that, because the Board rejected the College's attempts to gain a

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[18]That the selection of remedy is within the discretion of the reviewing court is well established. *See NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 30 (1943). Of course, had the particular exigencies of this case been different, the Second Circuit might have preferred to remand the case to the Board. In *Trustees of Boston University v. NLRB*, No. 77-1143 (1st Cir. May 8, 1980), the First Circuit, not being faced with arbitrary and improper Board action of the variety evidenced here, remanded the case to the Board for consideration in light of *Yeshiva*. In *NLRB v. Catholic University of America*, No. 78-2297 (D.C. Cir. April 21, 1979), the District of Columbia Circuit found that "no useful purpose would be served by remanding the case . . . ."

Yeshiva hearing, the attempts must have been "patently frivolous." (Petition, at 22-24). This theory does not comport with the law.

The Second Circuit accurately stated that the Board's test in deciding whether or not attorneys' fees are appropriate is whether the defenses or claims interposed were "frivolous." *See Orion Corp.*, 210 N.L.R.B. 633 (1974), *enf'd*, 515 F.2d 81 (7th Cir. 1975). The Board has held that it is not a sufficient basis for awarding attorneys' fees that the defenses raised are "debatable" rather than patently frivolous, *Heck's Inc.*, 215 N.L.R.B. 142 (1974); *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), *modified*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). This Court has recognized that the Board policy of not reimbursing litigants for the costs of confronting his adversary's "debatable" defenses is appropriate. *NLRB v. Food Store Employers Union, Local* 347, 417 U.S. 1, 8-9 (1974).

At the very least, the merits of the College's various attempts to have its *Yeshiva* claims litigated were "debatable." *Yeshiva* represented a dramatic change in the law. The Second Circuit's decision drastically changed the rules by which the Board was to assess the managerial status of faculty members of private colleges and universities. The Board was not willing to label the College's attempts at reconsideration in light of this dramatic change as frivolous, notwithstanding that the Board would not apply the law of the Second Circuit. Ultimately, the Second Circuit found the College's claims not just debatable, but persuasive.

Petitioner cannot fairly ignore the fact that the College's first request to have the new, and controlling, *Yeshiva* principles applied was made in advance of the run-off election. Only the Board's initial refusal to grant reconsideration at that early stage of the proceedings caused the College to persist in its attempts to secure a hearing on its *Yeshiva* claims. The costs of

litigation incurred by Petitioner are attributable in large part to the arbitrary and improper actions of the Board.

There can be no doubt that the existence of a dramatic change in the law, which prompted the College's *Yeshiva* claims, negates any assertion that the claims were "frivolous contentions not to preserve a defense but to further delay compliance with an earlier decision." *Orion Corp., supra.*

Petitioner's notion that Board denial of the defenses or claims must result in an award of extraordinary relief ignores the meaning of the "patently frivolous" test. The Board was consistent in the application of the test and did not exceed its authority or abuse its discretion in denying attorneys' fees. Accordingly, the Second Circuit's enforcement of the Board's denial does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the College respectfully submits that the Petition should be denied.

Dated: October 6, 1980

Respectfully submitted:

TRACY H. FERGUSON, ESQ.
BOND, SCHOENECK & KING
Attorneys for Respondent
Ithaca College
Office and Post Office Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

Of Counsel:
William L. Bergan, Esq.

Appendices

APPENDIX 1
Letter, dated 2-10-78 and Stipulation, dated 2-23-78

NATIONAL LABOR RELATIONS BOARD
REGION 3
111 West Huron Street
Buffalo, New York 14202 Telephone (716) 846-4931

February 10, 1978

William L. Bergan, Esq.
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

AAUP Chapter, Ithaca College
Attn: Charles J. Snyder, Jr., Pres.
Dept. of Speech, Pathology & Audiology
Ithaca College
Ithaca, New York 14850

Paul Mayo, Field Repr.
N.Y.S. United Teachers
1 Chemung Canal Plaza
Elmira, New York 14901

Re: Ithaca College
Case No. 3-RC-7107

Gentlemen:

Pursuant to our conversations of February 9, 1978, enclosed is a Stipulation to include the Albert Einstein Medical Center full time faculty members in the bargaining unit in the Ithaca College election. These personnel will vote by mail ballot before the election date.

Please sign and date this Stipulation and return it to this office as soon as possible.

Very truly yours,

/s/ MARK A. BAUER
Board Agent

Enclosure
MAB:mas

APPENDIX 1
Letter, dated 2-10-78 and Stipulation, dated 2-23-78

STIPULATION

We the undersigned parties to the captioned case, hereby agree and stipulate that the Regional Director may amend the unit description set forth in his Decision and Direction of Election in the captioned case by also including in the bargaining unit employees of Ithaca College who are employed on a full time basis at Albert Einstein Medical Center in New York City.

Accordingly, it is agreed and stipulated by the parties hereto that the said unit description may be amended to read as follows:

> All full time faculty members employed by Ithaca College at its Ithaca, New York location and at the Albert Einstein Medical Center in New York City, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

The undersigned parties do hereby also agree and stipulate that the inclusion in the unit of the said employees at Ithaca College who are employed at the Albert Einstein Medical Center shall not, in part or in whole, be grounds for objections to conduct affecting the results of the election, and we hereby agree and stipulate that the eligibility issues resolved herein are final and binding upon the parties.

ITHACA COLLEGE
(Employer)

BY Bond, Schoeneck & King Date 2/13/78
William L. Bergan

APPENDIX 1

Letter, dated 2-10-78 and Stipulation, dated 2-23-78

AAUP CHAPTER, ITHACA COLLEGE
(Name of Organization)

BY /s/ Charles J. Schneider Date 2/14/78

NEW YORK STATE UNITED TEACHERS OF
ITHACA COLLEGE FACULTY ASSOCIATION
(Name of other Organization)

BY /s/ Paul S. Mayo Date 2/14/78

Recommended:
Mark A. Bauer Date 2/23/78

Date approved 2-23-78

Thomas W. Seeler
Regional Director
National Labor Relations Board

Case No. 3-RC-7107

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

BOND, SCHOENECK & KING
ONE LINCOLN CENTER
SYRACUSE, NEW YORK 13202

August 24, 1978

Thomas W. Seeler,
Regional Director
Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

Re: Ithaca College
Case No. 3-RC-7107

Dear Mr. Seeler:

We forward herewith, on behalf of the employer Ithaca College, a motion for rehearing in the captioned proceeding together with a memorandum of law in support of that motion. Under separate cover, by copy of this letter, the other parties to the proceeding and the Executive Secretary of the Board are also being served with a copy of the papers.

The motion for rehearing, or to reopen the record, is made at this time in light of the recent decision of the Court of Appeals for the Second Circuit in the matter of *National Labor Relations Board v. Yeshiva University,* Docket No. 77-4182, July 31, 1978.

After reviewing the Court of Appeal's decision and after intensive discussions with representatives of the College, it is apparent that faculty members of Ithaca College discharge responsibilities and possess authority in strikingly similar manner to the responsibilities and authority which the Court concluded made the Yeshiva faculty supervisory or managerial personnel.

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

Ithaca College is a private, non-profit educational corporation whose ultimate operation is vested in a self-perpetuating Board of Trustees. The chief executive officer of the College is the President, whose executive staff consists of a Provost, a Vice President for Student Affairs, a Vice President for Development, a Business Manager, and a Controller. A Dean is responsible for the affairs of each of the College's six schools: The School of Humanities and Sciences; the School of Business Administration; the School of Health, Physical Education and Recreation; the School of Music; the School of Communications and, the School of Allied Health Professions. With the exception of the School of Business Administration, which is relatively new and in its formative stages, the schools are organized into departments.

In addition to the familiar administrative structure outlined above, faculty members participate at all levels of administration in policy-making and decision-making by various methods. The principal involvement of faculty members is through a series of committees, at the department, school, and college level, but faculty members also participate in individual capacities as well. For example, two faculty members who sit on the Board of Trustees of the College already have been determined by the Board to be managerial or supervisory personnel and thus ineligible to vote. Also, department chairmen, who represent and act on behalf of their respective departments, are instrumental in managing the college's affairs on a day to day basis.

Committees at Ithaca College are of two types, permanent committees and *ad hoc* committees.

The permanent committee structure at the College is organized principally in two tiers, one tier at the school level and

the second at the College level. College level committees include the Faculty Tenure and Promotions Committee, the Academic Policies Committee, the Academic Calendar Committee, the Library Committee, the Traffic Policy Committee, the Honorary Degrees Committee, and the Data Processing Users Committee, among others.

Permanent committees at the school level include personnel committees, curriculum committees, admissions and academic standings committees, and governance committees. Faculty members are appointed to these committees usually from among a group of nominees selected by the appropriate faculty unit.

The affairs of the College are conducted by interaction between administrative personnel and the appropriate committees.

In the hiring of new faculty members, the faculty members of the department in conjunction with the department chairman conduct searches, interview candidates, and ultimately recommend an individual for appointment to the Dean. Such recommendations are invariably honored.

In cases of promotion and tenure, the department faculty in conjunction with the department chairman, initiate the process. The department chairman's recommendations for promotion and tenure are honored almost without exception at the school level. When the Dean receives a recommendation for promotion or tenure, the matter is referred to the school committee on promotion and tenure which reviews the case and makes a recommendation to the Dean. Again, almost without exception, the committee's recommendations are followed. The matter is then forwarded to the Provost who refers the file to the College Tenure and Promotions Committee which makes a recommendation, jointly with the Provost, to the President. The College-level Committee has made recommendations contrary to

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

a Dean's recommendations, and the Committee's actions have been sustained.

In matters of curriculum, admissions policy, academic standing, grading, and degree requirements, faculty committees develop new policy and set standards either at the school level or college level as the case may be. School committees may, and do, set standards for their school which are more stringent than college requirements. Committee decisions in these matters invariably are final. Because degree requirements are set by committee, the course offering in a particular school often is thereby determined. Committee decisions may even affect course content when syllabi are reviewed.

In governance matters, each school has a governance document, and a governance committee. At the college level, the Faculty Council, composed of faculty members, is responsible for governance. The Faculty Council has jurisdiction in the area of curriculum, grading, scholastic standing, degree requirements, grievance handling, and compensation policy. The areas of jurisdiction for the Faculty Council are paralleled for the school governance bodies.

The college also has made extensive use of *ad hoc* committees.

In conducting searches for new officers, faculty search committees invariably are appointed and make effective recommendations. Search committees are used when a new president, vice president, or dean is to be appointed. Typically the search committee will select from among the applicants two or three individuals, one of whom is ultimately appointed. Staffing of a search committee is done either by election or by appointment after consultation with the Faculty Council or other appropriate faculty group.

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

Academic reorganization of the College has twice been the subject of consideration for *ad hoc* committees. In 1976-1977 a Task Force on Academic Reorganization, staffed by faculty members, conducted an extensive and in-depth analysis of the College and made substantial recommendations having far-reaching implications for the College's future. The Task Force Report forms the basis for an academic reorganization of the College now underway. Similarly, in 1970, a Task Force on Long Range Planning conducted a study of the College and submitted a report which resulted in extensive academic reorganization of the College, including creation of new schools. Faculty members, who composed the Task Force, recommended these changes.

The department chairmen at Ithaca College, who are full-time faculty members with teaching responsibilities, play a significant role as representatives of the faculty members in their respective departments in dealings with the Dean of the school. In such matters as hiring, promotion and tenure, and non-renewal of faculty contracts of employment, department chairmen, in conjunction with the faculty members of the department, effectively recommend to the appropriate Dean action to be taken. Salary recommendations, also, are made by chairmen and followed by the Dean.

In addition to the foregoing, faculty members participate in policy and decision making regarding student discipline and conduct, traffic regulation, purchase of computer equipment and allocation of computer resources, and library acquisitions and policy.

The faculty members at Ithaca College are integral elements in the managerial structure of the College. Their participation is continuous from the department level to the Board of Trustees and it is not token participation, but active and effective with

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

far-reaching consequences for college policy and decision making. Although this letter sketches only the highlights, the College is prepared to adduce proof which will establish the role of the Ithaca College full-time faculty as supervisory or managerial personnel in light of the *Yeshiva* decision.

Very truly yours,

BOND, SCHOENECK & KING

By: /s/ WILLIAM L. BERGAN

WLB/wp
cc: Thomas W. Seeler
Regional Director, Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

AAUP Chapter, Ithaca College
Department of Speech, Pathology
& Audiology
Ithaca College
Ithaca, New York 14850
Attention: Charles J. Snyder, Jr., President

Ithaca College Faculty Association
New York State United Teachers-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo, Field Representative

William Lubbers
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

MOTION FOR REHEARING

UNITED STATES OF AMERICA
BEFORE THE REGIONAL DIRECTOR OF
THE THIRD REGION OF THE
NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner

and

ITHACA COLLEGE FACULTY ASSOCIATION,
NYSUT-AFT,

Intervenor.

Case No. 3—RC-7107

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1. Ithaca College, the employer, by its attorney, Bond, Schoeneck & King, pursuant to Section 102.65 (3) of the Rules and Regulations of the National Labor Relations Board, because of an extraordinary circumstance, moves and requests that the regional director reopen the record or conduct a rehearing in this matter.

2. The "extraordinary circumstance" referred to in paragraph 1 is the decision of the United States Court of Appeals For the Second Circuit in *National Labor Relations Board v. Yeshiva University, et al,* (Docket No. 77-4182) decided on July 31, 1978, subsequent to the representation hearing and decision in this matter.

3. A hearing *de novo* is required inasmuch as all the faculty members found by the regional director to constitute the ap-

propriate unit in this matter are managerial and/or supervisory personnel upon application of the criteria set forth in the *Yeshiva* decision and are therefore not employees as defined by the National Labor Relations Act ("the Act").

4. The prejudice that Ithaca College will suffer if this motion is denied is that it may be forced to bargain collectively with a union representing faculty members not covered by the Act.

5. The evidence to be adduced at the new hearing is material and will demonstrate that the faculty members of Ithaca College are supervisory or managerial employees under the *Yeshiva* criteria and therefore not employees within the Act.

6. This evidence was not adduced at the original hearing because of longstanding precedent which has been changed by the *Yeshiva* decision.

7. If adduced and credited, the evidence will require a dismissal of the petition in this matter.

Dated: August 22, 1978.

Respectfully submitted,

BOND, SCHOENECK & KING

By: /s/ WILLIAM L. BERGAN
William L. Bergan,
A Partner
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

TO: THOMAS W. SEELER
Regional Director, Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

AAUP CHAPTER, ITHACA COLLEGE
Department of Speech, Pathology
& Audiology
Ithaca College
Ithaca, New York 14850
Attention: Charles J. Snyder, Jr., President

ITHACA COLLEGE FACULTY ASSOCIATION
NEW YORK STATE UNITED TEACHERS-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo, Field Representative

WILLIAM LUBBERS
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

DR. FRANK FALCONE
Ithaca College
Ithaca, New York 14850

WALTER W. WIGGINS
General Counsel
Ithaca College
308 N. Tioga
Ithaca, New York 14850

APPENDIX 2

Letter and Motion for Rehearing, dated 8-24-78

CERTIFICATE OF SERVICE

I certify that on August 24, 1978, I have caused to be served by certified mail, return receipt requested, a copy of the Motion for Rehearing and the Memorandum in Support of said Motion for Rehearing in Case No. 3-RC-7107.

CERTIFIED MAIL NO.	ADDRESSEE
137717	Thomas W. Seeler Regional Director Region Three National Labor Relations Board
137718	William Lubbers Executive Secretary National Labor Relations Board 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570
137719	AAUP Chapter, Ithaca College Department of Speech, Pathology and Audiology Ithaca College Ithaca, New York 14850 Attention: Charles J. Snyder, Jr., President
137720	Ithaca College Faculty Association — NYSUT-AFT 1 Chemung Canal Plaza Elmira, New York 14301 Attention: Paul Mayo, Field Representative

/s/ ROBERT D. ESSIG
Robert D. Essig
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Dated at Syracuse, New York
this 24th day of August, 1978.

APPENDIX 2
Regional Director's Denial of Motion

August 25, 1978

William L. Bergan, Esq.
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Re: Ithaca College
Case No. 3-RC-7107

Dear Mr. Bergan:

This acknowledges your letter of August 24, 1978 enclosing a "Motion For Rehearing" and a Memorandum of Law in support of your motion. In essence you seek a rehearing or the reopening of the record in this matter in light of the decision of the Court of Appeals for the Second Circuit in *N.L.R.B.* v. *Yeshiva University* issued on July 31, 1978. As you know the initial election in the above-numbered case has already been conducted pursuant to the Regional Director's Decision and Direction of Election and a run-off election is presently scheduled for September 29, 1978.

Your motion is denied. The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva*. In any case, whether the Board seeks review of this decision, or not, Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. For these reasons your motion is denied.

Very truly yours,

THOMAS W. SEELER
Regional Director

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
THIRD REGION

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner

and

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Intervenor.

Case No. 3-RC-7107

---

1. The Employer, Ithaca College, by its attorneys, Bond, Schoeneck & King, hereby requests review by the National Labor Relations Board of the Decision issued by the Regional Director for the Third Region on August 25, 1978 denying the Employer's motion for a rehearing in the captioned proceeding.

2. The basis for this request for review is made pursuant to Section 102.67(c)(1) and (4) of the Board Rules and Regulations.

3. The motion for a rehearing was made pursuant to Section 102.65(e) of the Board Rules and Regulations on the ground that

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

a rehearing was required because of the existence of extraordinary circumstances, namely, the decision of the United States Court of Appeals For the Second Circuit in *National Labor Relations Board v. Yeshiva University, et al,* (Docket No. 77-4182, decided July 31, 1978).

4. The *Yeshiva* case was decided subsequent to the representation hearing and the direction of an election in this proceeding.

5. A hearing *de novo* is required inasmuch as all the faculty members found by the Regional Director to constitute the appropriate unit in the matter are managerial and/or supervisory personnel under the criteria set forth in the *Yeshiva* decision and, therefore, are not employees as defined by the National Labor Relations Act.

6. The evidence to be adduced at the new hearing is material and will demonstrate that the faculty members of Ithaca College are supervisory or managerial employees under the *Yeshiva* criteria and are not employees within the Act.

7. This evidence was not adduced at the original hearing because of longstanding Board precedent which has now been seriously challenged by the *Yeshiva* decision.

8. The *Yeshiva* decision raises a substantial question of law regarding prior Board precedent.

9. The *Yeshiva* decision presents a compelling reason for the Board to reconsider its former policy regarding college faculty.

10. The covering letter sent to the Regional Director and a Memorandum of Law are submitted with this Request for

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

Review to provide the facts and precedent upon which the Employer relies.

Dated: August 30, 1978
at Syracuse, New York

Respectfully submitted,

BOND, SCHOENECK & KING

By: WILLIAM L. BERGAN
William L. Bergan, a Partner
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

TO: WILLIAM LUBBERS
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

THOMAS W. SEELER
Regional Director, Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

AAUP CHAPTER, ITHACA COLLEGE
Department of Speech, Pathology
& Audiology
Ithaca College
Ithaca, New York 14850
Attention: Charles J. Snyder, Jr.
President

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

ITHACA COLLEGE FACULTY ASSOCIATION
NEW YORK STATE UNITED TEACHERS-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo, Field Representative

CERTIFICATION OF SERVICE

I certify that on August 30, 1978 I caused to be served by certified mail — return receipt requested, a copy of a Request For Review of a Regional Director's Decision, and the Memorandum in Support of said Request for Review in Case No. 3-RC-7107 upon the following:

CERTIFIED MAIL NO.	**ADDRESSEE**
137221	William Lubbers Executive Secretary National Labor Relations Board 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570
137722	Thomas W. Seeler Regional Director, Region Three National Labor Relations Board 111 West Huron Street Buffalo, New York 14202
137723	AAUP Chapter, Ithaca College Department of Speech, Pathology & Audiology Ithaca College Ithaca, New York 14850 Attention: Charles J. Snyder, Jr., President

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

137724

Ithaca College Faculty Association
New York State United Teachers-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo,
Field Representative

/s/ ROBERT D. ESSIG
Robert D. Essig
BOND, SCHOENECK & KING
ONE LINCOLN CENTER
SYRACUSE, NEW YORK 13202

Dated at Syracuse, New York
this 30th day of August, 1978.

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD, THIRD REGION

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner,

and

ITHACA COLLEGE FACULTY ASSOC., NYSUT-AFT,

Intervenor.

Case No. 3—RC-7107

Submitted by:

BOND, SCHOENECK & KING
Attorneys for Ithaca College
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

Of Counsel:
William L. Bergan

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

FACTS

Pursuant to the filing of a representation petition by the Ithaca College Chapter of the American Association of University Professors, a hearing was held in January, 1978. Prior to the hearing, Ithaca College Faculty Association, NYSUT-AFT, had been granted intervenor status. In a decision dated February 3, 1978 the Regional Director of Region Three concluded that "all full time faculty members employed by Ithaca College at its Ithaca, New York location but excluding all guards, confidential employees, part time faculty, and supervisors" constituted the appropriate unit. No request for the Board to review that determination was filed.

Because of the Board's longstanding precedent that University and College faculty members are "employees" (i.e., do not occupy supervisory or managerial status) within the meaning of the National Labor Relations Act ("the Act")[1] the College believed that to raise an issue pertaining to the managerial status of its faculty members would be a futile gesture which could be construed as a dilatory tactic.

In accordance with the regional director's decision, an election in the matter was held. However, as a majority was not obtained by any of the parties to that election, a run-off election between "no union" and Ithaca College Faculty Assoc., NYSUT-AFT, has been scheduled for September 29, 1978.

Subsequent to the hearing, the Regional Director's decision, and the first election in this matter, the United States Court of

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[1]See *C.W. Post Center of Long Island University*, 180 N.L.R.B. 904 (1971); *Fordham University*, 193 N.L.R.B. 134 (1971); *University of Miami*, 213 N.L.R.B. (1974); and *Northwestern University*, 218 N.L.R.B. 247 (1975).

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

Appeals for the Second Circuit, in *National Labor Relations Board v. Yeshiva University,* ____ F.2d ____ (Docket No. 77-4182, decided July 31, 1978) held that the full time faculty at Yeshiva University had managerial status and that the "rigid criteria" utilized in the past by the Board in holding faculty members within the Act were "unjustified" and "arbitrary".

It is Ithaca College's position that it should have the opportunity to adduce evidence at a rehearing which will demonstrate that its faculty members are managerial employees under the criteria set forth in the *Yeshiva* decision.

By motion dated August 22, 1978, and mailed August 24, 1978, Ithaca College requested the Regional Director to conduct a rehearing. That motion was denied by a letter dated August 25, 1978 (see Attachment 1).

POINT I

The regional director should have granted a rehearing in this matter.

Under Section 102.65(e) of the Rules and Regulations of the N.L.R.B.:

"(1) A party to a proceeding may, *because of extraordinary circumstances,* move after the close of a hearing for reopening of the record, or move after the decision for reconsideration or rehearing . . . A motion for rehearing shall specify the error . . . alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error . . .

(2) Any motion pursuant to this subsection shall be filed within 10 days, or such further period as may be allowed . . ." (emphasis added)

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

The above rule is similar to certain language in section 10(e) of the Act which provides, in pertinent part:

> "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, *unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.* . . . If either party shall apply to the court to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . . the court may order such additional evidence to be taken before the Board . . ." (emphasis added)

Thus, under both the Act and the Rules and Regulations of the Board, a party to the proceeding will be given the opportunity to adduce additional evidence where its failure to do so at the original hearing can be satisfactorily justified because of "extraordinary circumstances".

Accordingly, the issue arises as to whether or not extraordinary circumstances are present here justifying Ithaca College's failure to adduce the evidence at the original hearing. More specifically, does a change in a significant and long-standing Board precedent satisfy the "extraordinary circumstances" test? There is authority which clearly demonstrates that a significant change in case law or Board precedent does justify the holding of a rehearing. *NLRB v. Lundy Manufacturing Corp.*, 286 F.2d 424 (2nd Cir. 1960); *Saratoga Harness Racing Assoc., Inc. v. New York State Labor Relations Board*, 6 A.D.2d 329, 177 N.Y.S.2d 401 (3rd Dept. 1958).

In *NLRB v. Lundy Manufacturing Corp., supra*, the Board adopted the findings of its Examiner and held the employer had committed an unfair labor practice. In doing so the Board

considered events which antedated the charges by more than 6 months. In reaching that conclusion the Board relied upon *Bryan Manufacturing Company,* 119 NLRB 502, enforced 264 F.2d 575. After the Board decision in *Lundy,* the *Bryan Manufacturing* case was reversed by the Supreme Court. Thereafter the Board contended that the employer in *Lundy* was precluded from seeking to avail itself of the reversal because of the alleged failure of the employer to urge that point before the Board. The Second Circuit held:

> "[I]t is not fatal that respondent did not include among its arguments a specific criticism necessarily futile at that stage, of a pertinent Board decision which had been enforced by a Court of Appeals. . . . Moreover, even if nothing had been said, the case would surely be one where 'the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,' §10(e), 29 U.S.C.A. §160(e)." 286 F.2d at 426.

Similarly, in *Saratoga Harness Racing Assoc., Inc., supra,* the court considered §707(2) of the New York Labor Law which contains the same language as that of §10(e) of the National Labor Relations Act which has been cited above. There the court noted that the decision of the New York Board sustained charges against the employer of unfair labor practices which "indisputably" constituted violation of both the New York and National Labor Relations Acts. Nevertheless, the court held that subsequent to the New York Board's decision, the Supreme Court rendered a decision material to whether the New York Board had jurisdiction over the matter. Although the employer had not raised the issue of jurisdiction either before the Board or before the lower court, the appellate court remanded the case to the Board to permit development of the record on the issue of jurisdiction. The court stated:

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

> "The circumstances [i.e., the change in precedent] seem to us sufficiently "extraordinary", within the meaning of the statute, to excuse appellant's failure to interpose a jurisdictional objection which, in the state of the decisional law and the State Board's practice prior to Guss, would in all likelihood have been futile." 177 N.Y.S.2d at 403

Similarly, in view of the Board's longstanding precedent as enunciated in *C.W. Post Center of Long Island University, supra,* and as reiterated in *Fordham University, supra, University of Miami, supra,* and *Northwestern University, supra,* "in all likelihood (it would) have been futile" for Ithaca College to contend at the original hearing that its faculty employees were managerial or supervisory personnel and therefore not covered by the Act.

At the rehearing, the College will adduce evidence which will demonstrate that its faculty, under the *Yeshiva* tests, are managerial or supervisory personnel not covered by the Act, and that the Board therefore lacks subject matter jurisdiction of this matter.

As a result of the Regional Director's refusal to conduct a rehearing, the employer is forced to consider the unattractive alternative of challenging each ballot of the more than 250 voters on the ground that he or she is a supervisor or managerial employee under the *Yeshiva* criteria. If the motion for a rehearing would have been granted, the need to resort to such a cumbersome procedure would have been obviated. To proceed by way of one rehearing rather than by 250 separate challenges and determinations will reduce the potential delay of having this issue resolved.

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

POINT II

Compelling reasons exist to justify the Board to grant this Request For Review.

As noted earlier at page 4, prior to the *Yeshiva* decision, the Board consistently ruled that university and college faculty members were employees covered by the Act. However, the Court in *Yeshiva* reversed this longstanding Board policy, and held that on the facts in that case, the faculty members were not covered by the Act. Therefore, there is presently an absence of binding Board precedent on this issue. There is also a compelling reason for the Board to reconsider its former policy.

CONCLUSION

The motion for a rehearing should be granted. Extraordinary circumstances exist which justify Ithaca College's failure to adduce evidence at the original hearing on the issue of the supervisory or managerial status of its full time faculty. To proceed by any other method will cause inordinate delay to the detriment of the parties hereto and to the Board.

Dated: August 30, 1978

Respectfully submitted,
BOND, SCHOENECK & KING
By: WILLIAM L. BERGAN
William L. Bergan
A Partner
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 2
NLRB's Denial of Request for Review

[57134 EVDAE

154157 R 0-14-01-017413
RAAUIJHZ RUEVDEL0013 2701625-UUUU-RUEVDAE.
NLRB
FM MARIO LAURO JR ASSOC EXEC SECY NLRB WSH DC

TO RUEVDAE/3/ROBERT ESSIG ESQ WILLIAM BERGAN ESQ BOND SCHONECK AND KING ONE LINCOLN CENTER SYRACUSE NY 13202

BT
SUS DUPE
RE ITHACA COLLEGE 3 RC 7107 EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DENIAL OF ITS MOTION FOR REHEARING IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD : DATED SEPT. 26, 1978
BT

• • • MESSAGE TELEPHONED OR DELIVERED BY
C.Z. DATE: 9/27/78 TIME 1:20
• • •

TELEPHONED/DELIVERED BY: LMS

NNNN
[57134 EVDAE

APPENDIX 3
Letter Withdrawing Voters' Eligibility List, dated 9-15-78

BOND, SCHOENECK & KING
ONE LINCOLN CENTER
SYRACUSE, NEW YORK 13202

September 15, 1978

Mr. Thomas W. Seeler,
Regional Director
National Labor Relations Board
Region 3
111 West Huron Street
Buffalo, New York 14202

Re: Ithaca College
Case No. 3-RC-7107

Dear Mr. Seeler:

As counsel for Ithaca College we wish to notify you that the Excelsior list previously submitted in the captioned matter is hereby withdrawn. This letter shall constitute the withdrawal document.

The basis for the withdrawal of the Excelsior list is that there are no faculty members who are eligible to vote in the election scheduled for September 29, inasmuch as the Ithaca College full time faculty members occupy supervisory or managerial status upon application of the standards described in the Second Circuit's decision in *NLRB v. Yeshiva University.*

Sincerely,

BOND, SCHOENECK & KING

By: W L BERGAN
William L. Bergan

WLB/KEM

cc: Mr. Frank Falcone

APPENDIX 4
Challenge to Voters' Eligibility

CHALLENGE TO VOTERS' ELIGIBILITY

UNITED STATES OF AMERICA
BEFORE THE REGIONAL DIRECTOR OF
THE THIRD REGION OF THE
NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer,

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner,

and

ITHACA COLLEGE FACULTY ASSOCIATION,
NYSUT-AFT,

Intervenor.

Case No. 3-RC-7107

TO THE NATIONAL LABOR RELATIONS BOARD:

Ithaca College hereby challenges the voting eligibility of each person whose name appears on the attached list, on the grounds that each such person is a manager or supervisor.

More specifically, according to the criteria established in the Yeshiva University decision (2d Circuit Court of Appeals, July 31, 1978), each person on the annexed list is a manager or supervisor within the meaning of the National Labor Relations Act. Further, it is the opinion of Ithaca College that these persons are not listed on any Excelsior list, because the College

APPENDIX 4
Challenge to Voters' Eligibility

has withdrawn the Excelsior list and has notified the Board of the withdrawal.

BOND, SCHOENECK & KING
Attorneys for Employer,
Ithaca College
Office & P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

EXCEPTIONS TO REGIONAL DIRECTOR REPORT ON OBJECTIONS AND CHALLENGES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner

Case No. 3-RC-7107

Ithaca College, by its attorneys, Bond, Schoeneck & King, takes the following exceptions to the Regional Director's Report on Objections and Challenges:

I. *The investigation was woefully incomplete and inadequate and the report contains gross factual errors which invalidate the conclusions and recommendations.*

The Regional Director characterizes the investigation of the objections and challenges as "full and complete," but, in fact, the investigation was conducted haphazardly and incompletely resulting in numerous misstatements of fact in the Report. The Report is so tainted with errors that the conclusions and recommendations resulting therefrom constitute a denial of due process.

Throughout the course of the investigation the Regional Director did not see fit to interview or otherwise take a

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

statement from *a single representative of the College*, although College officials were available to meet with the Regional Director's representatives. (Falcone Affidavit ¶5; Ex. I(I)).* It is not surprising, in view of this deficient investigation, that the Report is replete with misstatements of fact and unwarranted assumptions of fact. These errors are a shaky, indeed inadequate, foundation for the Regional Director's conclusions and recommendations. The general, overall inadequacy of the Report, notwithstanding the specific exceptions stated below, requires the Board to reject the Report in its entirety, just as the Employer takes exception to the Report in its entirety.

The misstatements of fact contained in the Report are listed immediately below, without elaboration on the particular legal significance of the errors:

a. The Regional Director states that the Petitioner filed timely objections on March 9 to the original election, held on March 3, 1978, and that a full and complete investigation of the objections and challenges was conducted. In fact, the Regional Director's Report on Objections concluded that the objections were not timely. (Ex. II(E)). Although the objections had been filed in the Regional Director's office in a timely manner, they were not *served* on the other parties in timely fashion and accordingly, the objections were overruled.

b. The Regional Director states that the Employer sought to challenge each and every voter by handing a challenge letter to the Board Agent on election day stating that under the *Yeshiva University* decision they were all managerial or supervisory employees. The inference which the Report would have a reader

*References are to exhibits contained in the Appendix of Exhibits to the College's Exceptions.

draw is that the College attempted to confuse and disrupt the election at the last instant by proffering its letter of challenge. In fact, the College's attorney had a telephone conversation with the Board Agent who was in charge of the election approximately three days prior to the election and advised him that the College intended to proceed in this fashion. (Bergan Affidavit, ¶6).

c. The Report states that the Board has considered the College's contentions with regard to the supervisory or managerial status of faculty members and has rejected them.

In fact, neither the Regional Director nor the Board has ever addressed the *merits* of the College's contention. The Employer's objective beginning with its motion for rehearing filed with the Regional Director on August 24, 1978 was *to have the opportunity to adduce proof* on the issues addressed by the *Yeshiva University* decision. The Regional Director, the Board and the courts rejected the Employer's attempts to present such proof prior to the runoff election. (Exs. IV and V). The Board, thus, never rejected the *merits* of the Employer's contentions, but rather rejected only the Employer's contention that it should have the opportunity to present proof to the Board before the election was held.

d. The Regional Director stated in the original Report that the Employer sought to have the election as soon after the opening of the fall term as possible. The initial Report was corrected by an Errata issued November 13, 1978, which revised the Report to state that the Employer had sought to have the election in October and the Intervenor sought to have the election as soon after the opening of the fall term as possible. In

fact, the Regional Director's Report is inaccurate in both its original and "corrected" versions.*

The College consistently sought to have the election during the last week in September, while the Intervenor advised the NLRB that it desired the election *no earlier than the second week in October.* (Falcone Affidavit, ¶22).

e. The Report states that "[i]t was specifically agreed that the Employer would send to the Regional office a list of those persons who needed mail ballots in time for the ballots to be mailed no later than September 12."

Although there were telephone conversations between the Board and College representatives, there was no specific agreement for handling the request for mail ballots. (Falcone Affidavit, ¶'s 14 and 15).

Unlike the procedure followed for the original March election, where the Board provided the parties with timely written notice in the form of a letter dated February 10, 1978, regarding mail-ballot procedures, the Board did not provide the College with timely written mail ballot instructions for the runoff election. (Ex. II(B)). Acting Provost, Frank Falcone, was advised by a Board Agent, who was not familiar with the file, that the mail ballot list should be submitted as soon as possible. (Falcone Affidavit, ¶14). However, the College did not receive written instructions from the Board until it received the Supplemental Notice attached to the Notice of Election, which was transmitted

*The second amendment contained in the Errata dated November 13 further demonstrates the lack of attention to detail which is characteristic of the entire Report. The Regional Director initially stated that Employer's objection 4 was untimely, but then apparently remembered that it was telecopied to, and received by, the Regional Office on time.

by a letter dated September 12, 1978 (Ex. I(A)(1)), *the very date* the Supplemental Notice of Election stated was the last date on which the Regional office would mail the ballots to mail-ballot voters.

f. The Regional Director's Report concludes that the "normal" procedures in the dispatch and receipt of the mail ballots "were carefully observed." This conclusion is untenable in light of the fact that the Employer received written notification from the Board of when the mail ballots would be mailed only *after the mail ballots had in fact been dispatched by the Board.*

g. The Regional Director's Report *"presumes"* that the Notice of Election was posted at the Albert Einstein Medical Center, and states that the faculty members located at the Albert Einstein Medical Center were aware of the mail-ballot procedure because they voted in the first election.

The Employer posted the Notice of Election throughout its establishment at Ithaca, New York in conformity with the directions from the Regional Director. The Albert Einstein Medical Center, however, is not an establishment of Ithaca College and, in fact, no notices were posted there. The Albert Einstein Medical Center is located at the Jacobi Hospital in New York City, a separate and distinct entity from Ithaca College. The Regional Director's presumption is in error and the presumption was unnecessary because the College could have advised the Regional office of what did occur if inquiry had only been made. (Falcone Affidavit, ¶16).

In addition, the Report concludes that the voters at the Medical Center *were aware of the mail-ballot procedures.* None of the four faculty members involved was interviewed by the Board to determine whether or not they were aware of the mail-

ballot procedure followed in September. The Board again assumes a fact with no basis whatsoever for the assumption. (Exs. I(J)(1), (2), (3), & (4)).

h. The Regional Director's Report states that of the *several* persons who appeared to vote whose names were not on the eligibility list, some were denied the opportunity to vote but others were later permitted to vote. In fact, the Board agents at the election in the morning indicated that any person who appeared to vote whose name was not on the *Excelsior* list *had the right* to vote and the Board agents were not authorized to deny that right; they could only insist that the vote be cast subject to challenge. *During the afternoon,* the Board agents reversed their positions, denying certain persons who appeared at the polling place the right to vote under challenge. (Metzger Affidavit, ¶6).

i. The Regional Director's Report states that ICFA is an *ad hoc* organization which was founded after the AAUP filed the petition in this case. In fact, the ICFA first became active in 1975 during the course of an earlier AAUP effort to become the certified representative of Ithaca College's faculty members. (Exs. III(C)(1), (2) & (3)).

j. The Regional Director's Report states that all dealings with the Board on behalf of ICFA have been through paid staff representatives of NYSUT.

In fact, Chester Galaska executed the Tally of Ballots dated March 3, 1978 and the Revised Tally of Ballots dated August 9, 1978 for ICFA-NYSUT. (Ex. III(D) (2) & (3)). In addition, Chester Galaska executed the Certification on Conduct of Election dated March 3, 1978 *as agent for* the ICFA in addition to his capacity as authorized observer. (Ex. III(D)(1)). Official Board documents

indicate that Galaska has repeatedly dealt directly with the Board.

Because the Regional Director's Report contains factual errors which are pervasive and of substantial magnitude, the Board should reject the Report in its entirety.

II. *The Regional Director erroneously recommends that the employer's objection 1(d) be overruled.*

Objection 1(d) states that:

> The Board erred, and violated its own procedures, in failing to supply written notice to the parties setting forth the time and date on which "mail in" ballots would be dispatched to the voters and the terminal time and date by which the ballots must be returned to the Regional Office.

The Regional Director's Report concludes that "the parties were fully apprised of the mail-balloting procedures prior to the mailing of the ballots" and that the Board was "following the procedure used in the original election . . . ."

In connection with the original election, the Employer received a timely written notice on or about February 11, 1978 advising the College of the procedure to be followed regarding mail ballots. (Ex. II(B)). This letter stated that mail ballots would be dispatched by the Region no later than February 14, 1978, which gave the College sufficient notice to ensure that faculty members away from Ithaca could be included in the request for mail ballots.

The Board sent no comparable written notice prior to the runoff election other than the supplemental Notice of Election which wasn't mailed from the Regional Office until September

12, 1978, the very date on which mail ballots were dispatched by the Region.

There were telephone conversations between the Board and College representatives, but these conversations did not result in a meeting of the minds as to the mail-ballot arrangements. (Falcone Affidavit, ¶ 15). The Regional Director erred in concluding that the College was fully apprised of the procedure to be followed. The Board's departure from the procedures mandated in its own Case Handling Manual for providing written notice to the parties requires that the election be set aside.

III. *The Regional Director erroneously recommends that the employee's objection 1(e) be overruled.*

Objection 1(e) states that:

> Certain members of the faculty deemed eligible by the Board were effectively disenfranchised by not receiving mail ballots.

The Regional Director's Report concedes only that the non-receipt of mail ballots by four faculty members at the Albert Einstein Medical Center in New York City was "unfortunate," but did not amount to disenfranchisement. This conclusion is unwarranted.

The Supplemental Notice of Election, issued by the Third Region, states, in part, that "all full time faculty who are stationed at the Albert Einstein Medical Center in New York City . . . *will* vote by mail ballot . . . ."

The Regional Director did not send timely written instructions to the Employer of the specific procedures to be followed in handling mail ballots for the September 29, 1978 runoff election,

although the Board did provide such written instructions for the original election held on March 3, 1978. The Regional Director attempts to shift responsibility for the disenfranchisement of the four faculty members to both the College and the faculty members themselves, while absolving the Regional Office of any responsibility.

Having conducted the initial election in March, the Regional Office was well aware that the Employer had faculty members in New York City who would require mail ballots. (Ex. II(A)(2); Ex. II(B); Ex. II(C); Ex. I(A)&(B)). There was a continuing responsibility on the part of the Regional Office to ensure that these faculty members received mail ballots. By not receiving mail ballots, the faculty members stationed at the Albert Einstein Medical Center were disenfranchised and the election should be set aside.

IV. *The Regional Director erroneously recommends that the employee's objection 1(f) be overruled.*

Objection 1(f) states that:

> The Board permitted certain faculty to vote under challenge while denying the same opportunity to other faculty.

The Regional Director's Report incredibly concludes that because certain challenged voters who were not full-time faculty members on the eligibility date were not eligible, other persons who sought to vote under challenge, but who were denied the opportunity, *"were similarly situated."* He concludes that denying them the right to vote under challenge did not result in disenfranchisement. *There is no basis for the Regional Director's conclusion that the persons denied a challenged ballot were similarly situated* because there was absolutely no investigation

to determine their status. If they had been permitted to vote under challenge, the matter could have been resolved following a proper investigation.

In addition the Regional Director does not explain why an arbitrary decision was made to deny challenged ballots to some individuals while allowing others to vote subject to challenge. Such patent, unexplained arbitrariness can only undermine confidence in the integrity of the Board's processes.

V. *The Regional Director erroneously recommends that the employer's objection 1(b) be overruled.*

Employer's Objection 1(b), in substance, charges that the Regional Director abused his discretion by not using a more recent eligibility date for the runoff election than the eligibility date for the March 3, 1978 election.

The Regional Director recommends that this objection be overruled because the Employer did not apply for a new eligibility date and because there has been no showing why an eligibility date closer to the second election was required.

The simple answer to why there had been no showing that an alternative eligibility date was necessary is that the Regional Director never sought any specific information concerning turnover from the College. The Report merely notes that there were 33 fewer names on the eligibility list for the September 29 runoff election. There was no inquiry as to the number of new full-time faculty members who commenced employment at the start of the 1978-1979 academic year. (Falcone Affidavit, ¶5).

The Regional Director's Decision and Direction of Election, dated February 3, 1978, notes that full-time faculty members must be given a full year's notice of termination if their con-

tracts are not to be renewed. (Ex. II(F)). Thus, any newly hired faculty members are employed for a minimum of two academic years. (Falcone Affidavit, ¶9). The Regional Director was not totally unaware of faculty employment and turnover patterns at educational institutions such as Ithaca College.

In addition to 27 full-time faculty members who left Ithaca College after the original election, 40 new full-time faculty members were appointed for the 1978-1979 academic year. (Falcone Affidavit, ¶'s 7, 8). These 40 individuals are vitally concerned with the outcome of this election and denying them the opportunity to vote by not establishing a new eligibility date is grounds for setting aside the election.

VI. *The Regional Director erroneously recommends that the employer's objection 2 be overruled.*

Objection 2 states that:

> Election observers for the Union occupied managerial or supervisory status.

The Regional Director's report states that the Board "has considered the Employer's contentions with regard to supervisory or managerial status of faculty members and has rejected them. . . ." Apparently this is the sole basis for recommending that objection 2 be overruled. The Board, however, has not ruled on the *merits* of the contentions but, rather, has ruled only that the Regional Director did not err when he denied the Employer's motion for a rehearing to adduce proof that faculty members occupy managerial or supervisory positions. (Ex. IV). Nowhere in the Report does the Regional Director deal specifically with the Employer's objection that the faculty members who served as union election observers were managerial or supervisory employees, even though the College was careful to select as ob-

servers only persons who clearly are non-supervisory, non-managerial and non-confidential *employees* under the Act.

VII. *The Regional Director erroneously recommends that employer's objection 3 be overruled.*

Employer's Objection 3 charges that a union representative misrepresented to a news reporter a statement made by an agent of the Regional Office.

The Regional Director concludes in the Report that the union official was not an agent of the ICFA and, in any event, the misrepresentation was not material. The Regional Director erred in both conclusions.

First, the individual who gave the statement to the press, Chester Galaska, has been a member of the ICFA Steering Committee since its inception in 1975. (Ex. III(C)). He has repeatedly been quoted as a spokesman for ICFA in the Ithaca newspapers and has appeared on local television speaking on behalf of ICFA. (Ex. III(E), (F) & (G); Falcone Affidavit, ¶21). In addition, he has executed official Board documents on behalf of ICFA. (Ex. III(C) (1) & (D)). Indeed, Chester Galaska, and his colleague Harvey Fireside, are the two individuals most directly associated with ICFA. (Falcone Affidavit, ¶18; Ex. III(B), (E), (F), (G) and (I)). In the eyes of the College administration, the Ithaca College faculty and the Ithaca community, Chester Galaska represents and speaks on behalf of ICFA. There can be no doubt that he is an agent for ICFA.

Furthermore, the misrepresentation was material. The Regional Director's September 8, 1978 letter states, in part, that "[N]o challenge to the ballots of . . .[faculty members whose names appear on the *Excelsior* list] will be accepted unless there is a positive showing that there has been a substantive change in

the status of the person challenged since the submission of the eligibility list on August 31, 1978." (Ex. I(D)).

Chester Galaska is quoted as saying in a September 28th (day before runoff election newspaper article) that "[o]n September 15, NLRB replied to Ithaca College that they could not challenge all the votes as this would be considered *'challenging frivolously'*." (Ex. III(A)). Galaska misstated the Regional Office in order to convince the eligible voters that the Board supported ICFA's contentions that the College was not asserting a legal position in good faith. No other inference reasonably follows from his quotation. The Regional Director's letter in no way suggests that the Employer was acting "frivolously."

By misrepresenting the Regional Director's statement in a publication widely circulated on the campus and throughout the Ithaca community, the union engaged in conduct affecting the election which requires that the election be set aside.

VIII. *The Regional Director erroneously recommends that objection 1(a) be overruled.*

Objection 1(a) states that:

> The Regional Director of Region 3 of the Board improperly rejected the Employer's withdrawal of the Excelsior list.

The Regional Director's Report dismisses this objection on the same basis as Objection 2, above. The report erroneously concludes that the Board had decided the merits of the Employer's contention that faculty members meet the *Yeshiva* managerial or supervisory criteria. The Regional Director has made no investigation whatsoever on the issue of whether or not Ithaca College faculty members are supervisory or managerial personnel.

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

IX. *The Regional Director erroneously recommends that objection 1(c) be overuled.*

Objection 1(c) states that:

> Representatives of the Board supervising the election improperly refused to accept and even consider the Employer's challenges to the eligibility of full-time faculty members.

The Regional Director's rationale in rejecting Objection 1(c) is linked to his rationale regarding Objections 2 and 1(a) above. The Report implicitly concludes that the *Yeshiva* issues were completely litigated and adjudicated when the Employer's motion to reopen the hearing was denied and denial of the motion was sustained by the Board.

The issues were not litigated, and the Employer in good faith took this step to preserve its legal position. (Exs. IV & V). By refusing to accept the challenges, the Regional Director attempted to frustrate further the Employer's efforts to have the Board resolve the issue of the faculty's status.

X. *The Regional Director erroneously recommends that objection 4 be overruled.*

The Regional Director's Report concludes that objection 4 should be overruled because an inadvertent omission of one name from the Excelsior list was due to the Employer's neglect and the Employer would profit by its own neglect if this objection were sustained. The Employer does not seek to reap a profit as a result of neglect, but, rather, contends that a voter, whose vote was challenged in the original election and who was determined to be eligible to vote, remained eligible to vote, and was disenfranchised because his name was excluded from the list.

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

XI. *The Regional Director erroneously recommends that the challenges to six faculty members be sustained.*

The Regional Director's Report concludes that the challenges to six faculty members should be sustained. This recommendation follows an incomplete and faulty investigation of the facts.

For example, Arthur E. McCue, a full-time faculty member of the College, was hired before the start of the 1977-1978 academic year with duties as Department Chairman of the Art Department and teaching duties. The Art Department had no other Chairman during the course of the 1977-78 academic year. Professor McCue alone was responsible for discharging departmental responsibilities of a full-time Chairman. The term "Chairman" denotes full-time responsibility for the Department. (Falcone Affidavit, ¶'s 23, 24).

The Regional Director's investigation would have uncovered such facts if it had been conducted with thoroughness.

XII. *The Regional Director erroneously recommends that the challenges to three votes not be resolved.*

The Regional Director's Report concluded that three challenges need not be resolved after sustaining six challenges. The tally of ballots resulted in only a slim seven vote margin for the Intervenor. Thus, the three votes are potentially crucial to the outcome of the election. An investigation would have revealed that these challenges are totally frivolous. The three voters were eligible to vote in the first election and were clearly eligible to vote in the runoff election since they remained full-

time faculty members on the date of the runoff election. (Falcone Affidavit, ¶'s 25-27).

Dated: November 28, 1978

Respectfully submitted,

BOND, SCHOENECK & KING
By: WILLIAM L. BERGAN
William L. Bergan
Attorneys for Employer
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 6
Election Petition, filed 9-5-80

Form NLRB-502 (11-64)
Form exempt under 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
PETITION

Case No. 3-RC-7896
Date Filed 9/5/80

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under Section 8 (b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

X RC—CERTIFICATION OF REPRESENTATIVE – A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

2. Name of Employer: Ithaca College.

Employer Representative to Contact: Dr. James Whalen.

Phone No.: 607-274-3011.

3. Address(es) of Establishment(s) involved *(Street and number, city, State and ZIP Code)*: Ithaca, New York, 14850.

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*: School.

APPENDIX 6
Election Petition, filed 9-5-80

5. Unit involved *(In UC petition: describe PRESENT bargaining unit and attach description of proposed clarification):* Included: All full-time faculty members. Excluded: All guards and supervisors as defined in the Act, and all other employees.

6a. Number of Employees in Unit: Approximately 280.

6b. Is this petition supported by 30% or more of the employees in the unit? X YES.

7a. Request for recognition as Bargaining Representative was made on (none made) and Employer declined recognition on or about _____ *(If no reply received, so state.)*

8. Recognized or Certified Bargaining Agent *(If there is none, so state):* None.

9. Date of Expiration of Current Contract, if any *(Show month, day and year):* None.

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Ithaca College Faculty Association/NYSUT/AFT
/s/ JOHN W. SCHARTZ, President
Ithaca College, Physics Dept.-Science Hall
Ithaca, NY 14850 Phone Number 607-274-3247

Willfully false statement on this petition can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)

APPENDIX 6
Letter Holding Proceedings in Abeyance, dated 9-9-80

NATIONAL LABOR RELATIONS BOARD
REGION 3
111 West Huron Street
Buffalo, New York 14202

Telephone: (716) 846-4931

September 9, 1980

Ithaca College
Attn: Dr. James Whalen
Ithaca, New York 14850

William Bergan, Esq.
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Ithaca College Faculty Association/
NYSUT/AFT
Attn: John Schwartz
Ithaca College
Physics Dept. — Science Hall
Ithaca, New York 14850

Bernard Ashe, Esq.
Kevin Harren
80 Wolf Road
Albany, New York 12201

Paul S. Mayo, Field Representative
New York State United Teachers
One Chemung Canal Plaza
5th Floor
Elmira, New York 14901

Re: Ithaca College
CASE 3-RC-7896

APPENDIX 6

Letter Holding Proceedings in Abeyance, dated 9-9-80

Gentlemen:

This is to advise you that further proceedings in the above case will be held in abeyance until a ruling is issued on the Petitioner's petition to the Supreme Court for a writ of certiorari to the Second Circuit Court of Appeals' decision issued on May 19, 1980, dismissing the charges in Case 3-CA-8962.

Very truly yours,
/s/ THOMAS W. SEELER
Regional Director

Received: Sept 10, 1980

The Daily Record
Rochester, New York

(6473-1773)

Spaulding Law Printing
Syracuse, New York

No. 80-263

In the Supreme Court of the United States

OCTOBER TERM, 1979

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

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Statute:

National Labor Relations Act, Section 8(a)(5) and (1), 29 U.S.C. 158(a)(5) and (1) 1

In the Supreme Court of the United States

OCTOBER TERM, 1979

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board held that Ithaca College ("the College") violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain collectively with the Ithaca College Faculty Association ("ICFA") as the exclusive bargaining representative of the College's full-time faculty members, and by refusing to furnish the Union with requested information necessary for the performance of the Union's duty as collective bargaining representative (Pet. App. B-11).

The Board rejected the College's contention that a unit of full-time faculty members was not appropriate because the faculty members were supervisory or managerial employees according to criteria established by the Second Circuit in *NLRB* v. *Yeshiva University*, 582 F.2d 686 (1978), aff'd, No. 78-857 (Feb. 20, 1980). The Board, adhering to its decision in an earlier representation proceeding that the College's faculty members were not managerial or supervisory employees, stated "[w]ith all due respect to the view expressed by the Second Circuit in *Yeshiva*, * * * we shall adhere to our position until the Supreme Court has passed on the matter" (Pet. App. B-5 n.3).[1] The Board denied ICFA's request for extraordinary remedies against the College (Pet. App. B-6 n.5), but nonetheless ordered the College to bargain, upon request, with ICFA (Pet. App. B-12 to B-13).

2. The College and ICFA sought review of the Board's order in the Second Circuit and the Board cross-petitioned for enforcement. While the case was pending, this Court affirmed the Second Circuit's decision in *Yeshiva* and held that the faculty members at that university were managerial personnel and thus outside the Act's protection. Slip op. 13-18. The Board thereupon requested the Second Circuit to remand the case to it for reconsideration in light of the intervening Supreme Court decision in *Yeshiva*. However, the College urged that summary judgment should be granted in its favor because the Board had failed to

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[1] The Board's decision issued on August 22, 1979 (Pet. App. B-14). On February 21, 1979, this Court granted the Board's petition for certiorari in *Yeshiva*. 440 U.S. 906.

grant its request for a hearing, made shortly after issuance of the Second Circuit's decision in *Yeshiva*. ICFA urged that the Board's order should be summarily enforced since the College had been untimely in raising the issue of managerial status.[2]

3. The Second Circuit denied ICFA's request to "enforce the Board's order as though the Supreme Court had never affirmed *Yeshiva*. It is quite obvious that *Yeshiva* is applicable and even the Board no longer seeks enforcement of its order" (Pet. App. A–10 to A–11).[3] The court also rejected the College's re-

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[2] The College did not raise the issue of managerial status until August 22, 1978, just prior to a scheduled runoff election. (The results of the first election, conducted on March 3, 1978, had proved inconclusive, and the Board's Regional Director had directed a second election.) Thus, on August 22, shortly after issuance of the Second Circuit's decision in *Yeshiva*, the College moved to reopen the record to enable it to show that its faculty were "managerial and/or supervisory personnel" (A. 3–5). The Regional Director denied the College's motion on the ground that he was bound to follow "Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals" (A. 8). On September 26, 1978, the College's request for review of the Regional Director's ruling was denied by the Board on the ground that it "raised no substantial issues warranting review" (A. 84 n.2) ("A." refers to the appendix in the court of appeals).

[3] The court found that the record belied the claim that the College's request for a hearing was untimely. The letter from the Regional Director denying the College's motion to reopen the record "made no mention of untimeliness, but rather, relied on the notion that 'Regional Directors are bound to follow and apply Board rather than Court precedent * * *.'" Moreover, "the Board is now willing to conduct a hearing" (Pet. App. A–7).

The court also held that ICFA's claim for attorneys' fees was properly rejected by the Board. "The continued claim of the

quest for summary judgment on the ground that "the Board's action in refusing to acknowledge the *Yeshiva* decision effectively precluded ICFA from presenting its case on those grounds" (Pet. App. A-11).

Nonetheless, the court refused to remand the case to the Board. It concluded that the Board had acted improperly in refusing to hold a hearing to resolve the issue of the status of the College's faculty as soon as the court's decision in *Yeshiva* had been handed down (Pet. App. A-7 to A-10). Recognizing that, though "we are empowered, we are not required to remand," and "may adjust our relief to the exigencies of the case in accordance with the equitable principles which govern judicial action," the court further concluded that "equitable factors, as well as the position of ICFA, lead us to conclude that a remand is here not appropriate" (Pet. App. A-11 to A-12).[4] Accordingly, the court

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College that the principles of *Yeshiva* be applied cannot without any show of reason be described as 'frivolous', which is essentially the Board's test in deciding whether or not counsel fees are appropriate" (Pet. App. A-11).

[4] The court explained (Pet. App. A-12):

> Here ICFA, whose interests are primarily at stake, has sought no remand, recognizes no factual issues, and in its supplemental brief filed after the Supreme Court's affirmance of *Yeshiva* and after oral argument still maintains that "the litigation in *Yeshiva* is of absolutely no import to this case." The Board had the opportunity to address the issue of faculty status and it improperly and arbitrarily refused to resolve that issue. This has exposed the College to needless expense and unwarranted prejudicial publicity. The election was close and hotly contested. The passage of time created by the Board's refusal to address these issues has undoubtedly been accompanied by changes in faculty personnel * * *.

denied enforcement of the Board's order, "without prejudice to the right of ICFA, or any other group, to file a representation petition with the Regional Office of the Board seeking to represent whatever employee group it deems appropriate within the Act as interpreted by the Supreme Court in *Yeshiva*" (Pet. App. A–12).

4. The Board believes that the Second Circuit erred in refusing to remand the case to the Board for reconsideration in light of this Court's decision in *Yeshiva*. The Second Circuit criticized the Board because it did not grant the College's request for a hearing on the status of its faculty as soon as the Second Circuit decided *Yeshiva*. However, since the Board had not acquiesced in the Second Circuit's decision and indeed was seeking review of that very decision by this Court, it was not unreasonable for it to adhere to its position in this case, pending the completion of such review proceedings.

The Board did not file its own petition for certiorari in this case because the decision of the Second Circuit rests on its assessment of the "equities" of this particular case and does not appear to present an issue of sufficient importance to be included in the limited number of cases that the government can properly ask this Court to review. However, the Board does not oppose ICFA's petition insofar as it requests this

Court to summarily vacate the order of the Second Circuit and remand the case to the Board for reconsideration in light of this Court's decision in *Yeshiva* (Pet. 25).[5]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

OCTOBER 1980

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[5] The other issues presented by ICFA's petition do not warrant review by this Court. Since the Regional Director's denial of the College's request to reopen the record referred only to the fact that the Board had not acquiesced in the Second Circuit's decision and made no mention of untimeliness, and since the Board, in affirming the Regional Director and in reiterating its position in the unfair labor practice proceeding, made no mention of untimeliness, the court of appeals did not act unreasonably in concluding that the College's contentions about faculty status were timely raised. Similarly, the court of appeals correctly affirmed the Board's denial of an award of the expenses incurred by ICFA in litigating this matter, since it is the Board's policy to make such an award to charging parties only when all the issues raised in defending against unfair labor practices are "patently frivolous." *International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 502 F.2d 349, 356–357 (D.C. Cir.), cert. denied, 417 U.S. 921 (1974). See *NLRB* v. *Food Store Employees*, 417 U.S. 1, 9 (1974). The College's contentions were not patently frivolous.

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 329579 95